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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 27

AMERICAN FEDERATION OF MUSICIANS, ETC., ET AL., PETITIONERS,

vs.

EDDIE WITTSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1964
CERTIORARI GRANTED MARCH 9, 1964

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United States Court of Appeals

FOR THE SECOND CIRCUIT

63 Civil 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs-Appellees,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

63 Civil 2442

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs-Appellees,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

Statement Under Rule 15(b)

The two actions involved in this appeal, 63 Civil 2442 and 63 Civil 2548, were instituted by service of summons

and complaint by appellees August 14 and 23, 1963, respectively.

On September 18, 1963, appellants moved for a consolidation of these two actions. The motion was granted and the actions consolidated for purposes of trial on October 16, 1963, by Judge Richard H. Levet.

On September 18, 1963, appellant American Federation of Musicians moved for summary judgment in 63 Civil 2548.

On September 23, 1963, appellant Associated Musicians of Greater New York, Local 802, moved for summary judgment in 63 Civil 2442.

On October 28, 1963, Judge Levet filed his Opinion, Findings of Fact and Conclusions of Law (No. 29,321) granting summary judgment to appellees in 63 Civil 2548 and on the second claim for relief in 63 Civil 2442.

On October 30, 1963, Judge Levet filed his Opinion, Findings of Fact and Conclusions of Law (No. 29,329) granting appellant Local 802's motion for summary judgment on the first cause of action in 63 Civil 2442.

Judgment was filed in 63 Civil 2548 on October 30, 1963. On the same date appellant American Federation of Musicians filed a notice of appeal.

Judgment was filed in 63 Civil 2442 on November 1, 1963. On the same date appellant Local 802 filed a notice of appeal from that portion of the judgment granting appellees summary judgment on the second claim for relief.

Complaint in 63 Civil 2442

(Schwartz R. 4-32)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

COMPLAINT
63 Civil Action 2442

Plaintiffs, complaining of defendant herein, by Godfrey P. Schmidt, their attorney, allege:

FOR A FIRST CLAIM.

1. This Court has jurisdiction over this cause of action under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter called "Act of 1959") and under Section 302 of the Labor Management Relations Act of 1947, as amended (hereinafter called "Act of 1947").

2. Plaintiffs are, and at all of the times hereinafter mentioned were, members in good standing of defendant labor union; and they bring this action as a class pursuant to Rule 23, F. R. C. P., for themselves and all sidemen who are members of defendant and who are so numerous as to make it impractical to bring them all before this Court.

3. At all of the times hereinafter mentioned, plaintiff, Julius Schwartz, was and still is a citizen of the State of New York, residing in Port Washington, New York.

4. At all of the times hereinafter mentioned, plaintiff Buddy Kane (alias Irving Katz) was and still is a citizen of the State of New York residing in Plainview, Long Island, New York.

5. At all of the times hereinafter mentioned, plaintiff, Robert Curtis, (*alias* Kitsis) was and still is a citizen of the State of New York, residing in Glen Cove, Long Island, New York.

6. At all of the times hereinafter mentioned, plaintiff, John C. Rosenmerkel (*alias* Jack Rosenmerkel), was, and still is a citizen of the State of New York, residing in Sunnyside, Long Island, New York.

7. At all of the times hereinafter mentioned, plaintiff, William Arnold, was and still is a citizen of the State of New York, residing in New York City, New York.

8. At all of the times hereinafter mentioned, plaintiff, Frances Baron, was and still is a citizen of the State of New Jersey, residing in Newark, New Jersey.

9. At all of the times hereinafter mentioned, plaintiff, Leonard O. Gaskin, was and still is a citizen of the State of New York, residing in New York City, New York.

10. At all of the times hereinafter mentioned, plaintiff, Louis V. Schwartz, was and still is a citizen of the State of New York, residing in New York City, New York.

11. At all of the times hereinafter mentioned, plaintiff, Herbert Wasserman, was and still is a citizen of the State of New York residing in New York City, New York.

12. At all of the times hereinafter mentioned, plaintiff, Judith Bregman (*alias* Jay Palmer), was and still is a citizen of the State of New York, residing in New York City, New York.

13. At all of the times hereinafter mentioned, plaintiff, Solomon Kosarin (*alias* Sol Kosarin), was and still is a citizen of the State of New York, residing in New York City, New York.

14. At all of the times hereinafter mentioned, plaintiff, Glen Williams, was and still is a citizen of the State of New York, residing in Syosset, Long Island, New York.

15. At all of the times hereinafter mentioned, plaintiffs were and still are regularly employed as sidemen by various orchestra leaders operating in either the single engagement field or the steady engagement field or in both.

16. Defendant, Associated Musicians of Greater New York, Local 802 (hereinafter sometimes called "Local 802"), is a labor organization within the meaning of the Act of 1959 and of the Act of 1947; and it is affiliated with American Federation of Musicians of the United States and Canada (hereinafter called "Federation"). Its principal office is located at 261 West 52nd Street, New York City, New York.

17. For some years prior to institution in this Court of Civil Action No. 62 Civil 2552, defendant enforced a certain By-law, or "Standing Resolution" having the force of By-laws, which is printed at pages 65-67 of the "Constitution and By-laws of Associated Musicians of Greater New York, Local 802, American Federation of Musicians revised as of September 26, 1960"; and reading as follows:

> Resolved, that effective as of October 1, 1943, until December 31, 1960:

(a) There shall be payable and collected from all members a 1 per cent tax on all engagement based on scale price therefor;

(b) Said 1 per cent tax shall likewise be levied on all salaries paid to officers of our local and to all members thereof regularly employed by the Union;

(c) All income realized from items (a) and (b) above mentioned shall be allocated to the General Fund of our local. Effective as of October 15, 1955, until December 31, 1960:

(a) There shall be payable by and collected from all members an additional 1 per cent on all engagements based on scale price therefor;

(b) Said additional 1 per cent tax shall likewise be levied on all salaries paid to officers and to all Local 802 members thereof regularly employed by the Union;

(c) All incomes realized from items (a) and (b) above-mentioned shall be allocated as follows:

1. ½ (one-fourth) (*sic*) of 1 per cent to be set aside for the purpose of continuing the campaign for live music.

2. ¼ (one-fourth) of 1 per cent to be set aside for a strike fund.

3. ½ (one-half) of 1 per cent to be allocated to the General Fund of our local to take care of the rising costs of administering the affairs of Local 802.

(Note: On all engagements there is payable a total of 2 per cent tax until December 31, 1960.)

Effective as of January 1, 1961: The 2% Tax payable on all engagements be reduced ½ of 1%.

Therefore, on all engagements there is payable a total of 1½% tax to the General Fund. The leader shall be held responsible for the collection and payment of this tax.

There be no further specific allocation of ¼ of 1% to the Live Music Fund and no further specific allocation of ¼ of 1% to the Strike fund.

(a) There shall be payable by and collected from all members a 1½ per cent tax on all engagements based on scale price, therefore: Leaders shall be held responsible for the collection and payment of this Tax.

(b) Said 1½ per cent tax shall likewise be levied on all salaries paid to officers of our local.

(c) All income realized from items (a) and (b) above-mentioned shall be allocated to the General Fund of our local.

18. The aforesaid "Standing Resolution" or By-law holds the *orchestra leader* (not the *sideman*) responsible for the collection and payment of the 1½% (formerly 2%) "local tax".

19. The decisions of this Court (Opinions No. 28179 anl 28294) and of the United States Court of Appeals (dated April 30, 1963) in 62 Civil 2552 construed Section 302 of the Act of 1947: (a) to forbid defendant from demanding or collecting from orchestra leaders who are employers the said "local tax"; and (b) to forbid such orchestra leaders from paying said "tax" (despite defendant's unilateral and long-standing policy and practice under which defendant and Federation regarded all orchestra-leaders as employees, regardless of the relevant facts and conduct).

20. Apparently because defendant eventually recognized the illegality (as defined by the Courts in the afore-

said decisions) of demanding and collecting the said "local tax" from orchestra-leader-employers, defendant's Executive Board, unilaterally and without any By-laws Meeting or other Meeting of the membership of Local 802 and in violation of the By-laws of Local 802, began, somewhere in 1962, to collect the said "local tax" directly from *sidemen,* as if said "taxes" were or constituted "membership dues".

21. To facilitate such collection of "local taxes" directly from sidemen or employee-musicians (*i.e.*, employees of the orchestra leaders who negotiate the engagements), defendant's Executive Board, within the last three months, issued to orchestra leaders and sidemen a printed form of wage deduction authorization, copy of which is hereto annexed marked "Exhibit A", to form part of this complaint.

22. Said form of authorization ("Exhibit A", hereto annexed) defendant required to be signed by sidemen; and it purports to authorize orchestra-leader-employers to deduct the "local tax" of 1½% from the wages which said leaders pay to their sidemen in all single and steady engagements; and to transmit this deduction to defendant as "*union dues.*"

23. The said "local tax" at no time in defendant's history prior to institution of 62 Civil 2552 constituted or was regarded as "*membership dues*" within the meaning of those words as used in Section 302 of the Act of 1947. Hereto annexed, marked Exhibit B, to form part of this complaint, is a relevant quotation from "*The Musicians' Voice*", which has a large circulation within defendant's membership.

24. In the single engagement field and in large areas of the steady engagement field, defendant, although it is in other respects a labor union, never bargains. and has

never bargained, collectively with any employer; and it never concludes, and has never concluded, labor contracts with orchestra leaders who are employers of sidemen in the single engagement field and in large areas of the steady engagement field.

25. Thus, the said form ("Exhibit A" hereto annexed) purports to be a check-off authorization in circumstances where (a) what is being checked off is not, under the law or in union practice and theory, *"membership dues"*; (b) there is no labor contract under which the check-off is authorized; and (c) defendant refuses to recognize orchestra leaders as employers or to deal with them as such.

26. Under the circumstances aforesaid, the said purported "dues" deduction authorization is violative of Section 302 of the Act of 1947 as amended.

27. Defendant's unilateral and dishonest conversion of the "local tax" into pretended "membership dues" was effectuated by defendant's Executive Board in violation of Title I, Section 101(a)(3) of the Act of 1959; in that it was not authorized either by a majority vote, by secret ballot, of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, nor by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot.

28. Defendant's unilateral and dishonest conversion of said "local taxes" into purported *"membership dues"* by use of the aforesaid form ("Exhibit A" hereto annexed) violates Section 101(a)(1) of the Act of 1959; because it denies equal rights and privileges to members of defendant organization to attend membership meetings and to participate in deliberations and voting upon the proper business of such meetings.

29. Defendant's unilateral and dishonest conversion of said "local tax" into alleged "membership dues" as aforesaid, violates Section 101(a)(2) of the Act of 1959; in that it denies to plaintiffs, and all other defendant-union members, the right to meet and assemble freely with other members to express views, arguments or opinions about such alleged "membership dues" and to express at meetings of defendant organization views upon business which should properly come before such meeting.

30. Defendant, upon information and belief, began using the said form ("Exhibit A" hereto annexed) approximately three to six months prior to institution of this case of action.

31. Use by defendant of the aforesaid form ("Exhibit A" hereto annexed) and the direct collection of the said "local tax" from *sidemen*, violate defendant's By-laws as quoted above: (Par. 17 *supra*); in that

(a) said By-laws prescribe specifically that only the *leader*, not the *sideman*, shall be held responsible for the collection and payment to defendant of the "local tax" (Under said By-laws the orchestra leader, who is the employer in the single engagement field and in most of the steady engagment field of the sidemen in his orchestra, is alone responsible for the collection and payment of the tax. Therefore, the sidemen under said By-law, are not responsible for direct payment of said "Local Tax" to the defendant); and

(b) said By-laws require that changes of "tax" collection methods, as well as imposition of new dues and conversion of "taxes" to "membership dues" shall be authorized only by the September By-laws or by Special meeting.

32. No By-laws, no Constitution and no literature ever printed or distributed by defendant prior to institution of

62 Civil 2552, referred to the said "local tax" as *"dues"* or "membership dues"; and as a matter of fact said "local taxes" were never so regarded by orchestra leaders or sidemen who are or were members of defendant organization; nor were they ever so regarded or referred to before said litigation by defendant's officer or members.

33. To convert the said "local taxes" into "membership dues" is to place a highly inequitable and discriminatory burden upon a relatively few union members for the benefit of the vast majority of other members; because it means that these alleged "membership dues" are collected only from the comparatively few active, professional musicians and not from the vast number of professionally inactive members of defendant, who scarcely ever render any musical performances as such members. The result would be that some of defendant's members would pay, as such pretended "membership dues" as much as several hundred dollars per year, while others would not pay a single dollar for such "membership dues".

34. Upon information and belief, defendant purports to comprise more than 28,000 members. Of this number, less than 5,000 sidemen are really active as professional musicians. Most of the remaining members, numbering about 23,000, comprise persons who are simply union cardholders and who, from year to year, make almost no contribution of "local taxes" to the Union treasury (and of this remaining 23,000, more than 2,000 do not even pay the annual dues).

35. Plaintiffs have no adequate intra-union remedy; nor are there available to plaintiffs any intra-union procedures for the purpose of vindicating their rights under Federal Acts or for correcting the aforesaid illegality, inequity and discrimination; since defendant's officers have obstructed consideration of this problem by membership meeting.

36. Because of defendant's previous efforts to collect the said "local tax" directly from sidemen, plaintiffs, by petition dated February 13, 1963, signed by 553 members in good standing, addressed the following request (seeking a special meeting pursuant to defendant's By-laws) to defendant's Executive Board:

> We, the undersigned members of Local 802 A. F. of M., petition the Executive Board of Local 802, to hold a *special meeting* at Palm Gardens on the afternoon of April 24, 1963, 3:30 P. M., or at some other convenient location should Palm Gardens not be available.
>
> The purposes of this meeting shall be the following:
>
> 1) To determine the acceptance and practicability of the *recent tax form*, which attempts to place the responsibility for the computation and payment of the 1½% Tax, upon the individual member; and to find, if possible, a lawful substitute for the Tax (emphasis added in this paragraph).
>
> 2) To devise and enact new methods if necessary, for the payment of membership funds into the Union treasury.
>
> We further petition the Executive Board to:
>
> Suspend immediately upon receipt of this petition, the hearing of any case before the Trial or Executive Board involving the non-payment of the 1½% Local Tax as of December 12, 1961. Those cases dealing with charges and disciplinary action affecting the "good standing" of those charged members, shall be held in abeyance pending the decisions of the members at this meeting.

37. The "recent tax form" referred to in the foregoing quotation is hereto annexed, marked "Exhibit C", to form

part of this complaint. It was the forerunner of the authorization form which is hereto annexed as "Exhibit A", and defendant first distributed it to orchestra leaders and sidemen during 1962. Apparently both forms are now in use.

38. In many cases, with the encouragement or permission of defendant, orchestra leaders deduct the "local tax" without execution of any authorization by the involved sidemen; in some cases orchestra leaders refuse to pay wages to their sidemen unless and until the sidemen involved first execute an authorization (Exhibit A); and in many cases the deductions made by such orchestra leaders are improperly computed, and the orchestra leader does not even pay to defendant the full amount thus improperly deducted from sidemen's wages.

39. In March, 1963, defendant by its Executive Board rejected the aforesaid petition signed by 553 members.

40. Hereto annexed, marked "Exhibit D", to form part of this complaint, is a photostatic copy of the first page of "*Allegro*", official organ of defendant, dated June, 1963 (Vol. XLI No. 6) wherein the latter, unilaterally and without membership meeting but solely by the *ex parte* decision of its officers and Executive Board, has most recently and most emphatically promulgated the aforesaid unlawful, inequitable and discriminatory conversion of said "local tax" into alleged union "membership dues". Said publication (a) falsely represents the rationale of the U. S. Court of Appeals decision and of this Court's decisions as precedents construing Federal Acts; (b) falsely charges plaintiffs and other union members associated with them with "deliberately trying to deceive the members of the Local; and (c) falsely asserts, in effect, that said "local tax" constitutes "membership dues". However, the publication does show the futility of trying to enlist the cooperation of defendant's officers in obtaining the relief sought by this complaint.

41. Plaintiffs have no adequate remedy at law.

FOR A SECOND SEPARATE AND DISTINCT CLAIM.

42. Plaintiffs repeat and reallege each and every allegation of the paragraphs of this complaint numbered 1 through 16 and paragraphs numbered 35 and 41.

43. The "membership dues" established by Article 3 of the By-laws of defendant Local 802 are now and for many years have been "$24.00 per annum, payable $6.00 quarterly in advance on January 1, April 1, July 1, and October 1, * * *; and failure to pay any quarter's dues during the first month of such quarter, * * * increase[s] the installment due by 25¢ as a fine. If such fine and arrears are not fully paid before the end of that quarter, the membership and all rights and privileges of the one so in arrears * * * [is] deemed automatically ended and terminated, without further notice, anything contained in these By-laws to the contrary notwithstanding * * *".

44. Federation is a labor union or labor organization within the meaning of the Act of 1947 and the Act of 1959. It is affiliated with the AFL-CIO; and its principal office and place of business is located at 425 Park Avenue, New York 22, New York. It is an international union comprising hundreds of local unions throughout the United States and Canada.

45. Purporting to act pursuant to its Constitution and By-laws, Federation convoked, and defendant participated in, Federation's Annual Convention at the Fontainebleu Hotel, Miami Beach, Florida, during the period from June 10 to June 13 (inclusive), 1963.

46. Upon information and belief, approximately 1200 delegates attended said Convention; and among them were three delegates from defendant.

47. Upon information and belief, after the aforesaid Convention had been in progress for about three days, Federation's officers distributed to the attending delegates, at about 8:15 P. M. on June 12, 1963, a proposed resolution in the form of a printed leaflet, entitled "Recommendation No. 11, Recommendation of the Joint Law and Finance Committees", copy of which is hereto annexed, marked "Exhibit E" to form part of this complaint.

48. Federation's officers, aided and abetted by defendant's President, railroaded this proposed resolution to ballot by the Locals represented at the Convention within a period of less than six hours after distribution of the text thereof to the said delegates.

49. Upon information and belief, the delegates at said Convention were initially asked by Federation's officers to vote upon the said Recommendation by a voice vote.

50. Upon information and belief, the said voice vote was apparently unfavorable to passage of the said Recommendation; but the Chair rules, nevertheless, that "the ayes and the nays appeared to be of equal response". As a result Federation's officers arranged for a different voting procedure, allegely "in accordance with the provisions of Article 5 of the Federation's Constitution", namely, a roll-call voting procedure under which each Local represented at the Convention was asked to cast as many votes as that particular Local had members.

51. The aforesaid roll-call voting procedure resulted in a vote which took place in an "unusual night session" approximately 2:00 A. M., Thursday, June 13, 1963.

52. Said special and unusual night session had not been announced prior to the Convention. It began at about 8:15 P. M. on June 12th and it ended at about 2:30 A. M. June 13, 1963.

53. Upon information and belief, at such night session, and pursuant to said roll-call voting procedure, 185,068 votes were cast for Recommendation No. 11 and 113,742 votes were cast against the Recommendation.

54. Defendant, at said unusual night session, cast 28,438 votes *against* the Recommendation; despite the fact that one of defendant's delegates, namely, its President, had delivered to the Convention a fervent plea *in favor* of the Recommendation.

55. No notice of any kind was previously given to the members, to the delegates or the locals represented by the delegates respecting Recommendation No. 11.

56. The aforesaid roll-call voting procedure, by which Recommendation No. 11 was railroaded through the said Convention, was in violation of Section 101, Title I of the Act of 1959; in that, at said Convention no "majority of the delegates" voted for said "Recommendation" or was counted: since it was only *Locals* which voted, on the basis of their respective memberships.

57. Recommendation No. 11 was and is a composite of thirteen different resolutions, which were arbitrarily combined and presented to the delegates at the Convention in the form of a "package", on a take-it-or-leave-it basis; and Federation's officers permitted no division or separate consideration of each of the thirteen involved items.

58. Passage of the said Recommendation No. 11, as aforesaid, was also a violation of Section 101(a)(1) of Title I of the Act of 1959; because such passage violated the equal rights of the delegates, who are all members of the Federation in that said members-delegates: (a) did not have equal rights and privileges within the organization to vote at said Convention; (b) did not have an equal or genuine right to participate in the deliberations and voting

upon the business before the Convention as Recommendation No. 11; and (c) the rules and regulations adopted by Federation for the purpose of conducting the Convention and the unusual night session were unreasonable and were effective to suppress rather than to express the free legislative wishes of the assembled delegates.

59. The equality of the member-delegates' rights was further prejudiced by the fact that voting was not by delegates, as the Act of 1959 requires, and indeed as the Constitution and By-Laws of the Federation require, but by *Locals*, each local casting as many votes as the number of its members.

60. Upon information and belief, the number of Locals voting against said Recommendation No. 11 exceeded the number of Locals voting for it.

61. In view of all of its circumstances, especially the lateness of the protracted and unusual night session and the lack of previous notification respecting the text of Recommendation No. 11, the said night session, in fact and in law, amounted to a "special convention" within the meaning of Section 101(a)(3) of the Act of 1959; and no thirty day notice of the said Recommendation No. 11 was given as required by that Section.

62. The said roll-call vote violated Section 101(a)(1) of Title I of the Act of 1959; because it permitted Federation's Locals to vote the same members two, three or four times; since many of defendant's members belong to two, three or four Locals of the Federation. Thus, the equal rights and privileges of many members were further infringed and violated.

63. Recommendation No. 11 purports to increase the "membership dues" of defendant union; and defendant pursuant to said Recommendation No. 11 is planning to

enforce this increase in "membership dues" on the effective date of said Recommendation, namely on and after January 1, 1964.

64. Recommendation No. 11 establishes a "per capita tax" upon a discrimatory and unfair basis; because wherever Federation members belong to more than one Local affiliated with Federation, those members pay per capita taxes for *each* Local to which they belong.

65. The delegates at said Convention had no opportunity to confer with members of their respective Locals prior to voting on the advisability of Recommendation No. 11; and their mature judgment, as delegates assembled at a convention, was deliberately limited and in many cases suppressed by the manner in which Federation conducted the Convention.

66. The important matters arbitrarily gathered together in Recommendation No. 11 were left, because of the manner in which Federation conducted the said Convention, to uninstructed delegates and to delegates who had absolutely no opportunity to seek guidance and instruction from the members they represented.

67. As appears from the text of Recommendation No. 11, the members of the Convention were misinformed and misled thereby into regarding certain "taxes" based on the earnings of members (the so-called 10% "traveling surcharge", the so-called 10% "radio and television tax" and the so-called "theatre defense fund tax") as union "membership dues"; when, in fact, such taxes are not in fact or in law "membership dues" and were never so regarded by defendant, its officers or members during any time prior to certain recent litigation in which it redounded to the opportunistic advantage of Federation and of defendant to dub such "taxes" as "dues".

68. Such alleged "dues" would be illegal and discriminatory, since some members of Federation would, on the basis of such "dues" requirements, pay more than $10,000.00 per year for "membership dues" and most members would pay nothing.

69. Under Federation's By-laws, which are binding upon defendant, delegates or Locals desiring to introduce any resolution or measure to a convention are required to forward such resolution in written form to Federation's Secretary not later than fifteen days before the first session of the convention. In this respect, the Federation's By-laws were violated by passage of Recommendation No. 11, which was submitted only six hours prior to the night session at which it was voted.

70. Federation's By-laws require that any resolution or measure shall be printed and distributed to the Convention delegates at the *first* session of the Convention; and in this respect passage of Recommendation No. 11 violated such By-laws, as appears from the facts hereinabove set forth.

71. Federation's By-laws provide that no alterations or amendments of Constitution or By-laws may be made unless they are first proposed in writing; and such alterations or amendments must receive a majority vote *of the delegates* present in order to become a union "law". The passage of Recommendation No. 11 violated Federation's By-laws in this respect, because the *delegates* did not vote.

72. Paragraph numbered 4 of the Recommendation No. 11 provides:

> "Each Local shall maintain local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum * * *".

As a result of this and other language in Recommendation No. 11 enacted as aforesaid, defendant in its official organ, "*Allegro*", for June, 1963, page 3, announced under the heading "Important Changes":

> "The AFM Convention adopted some important changes in its fiscal and other policies. Following are the most important of these changes:
>
> AFM Per Capita Dues
>
> "Each member shall pay through Local 802—in addition to the regular periodic dues of $24.00 per year—the sum of $6.00 per capita dues to the American Federation of Musicians • • • A new law approved by the Convention requires that Locals erase from their rolls, members who are delinquent for more than six months, with power to act before that time in the discretion of Local Boards. • • •"

Thus, defendant, aided and abetted by Federation, will (unless restrained by this Court) as of January 1, 1964, put into effect what it dishonestly calls an increase in "membership dues".

73. Said increase became effective under procedures which violate the Act of 1959, particularly Section 101 (a) (3) thereof, which requires that increases of dues and initiation fees by any labor union may be enacted only "by majority vote of the delegates voting at a regular Convention or, at a special Convention of such labor organization held upon not less than 30 days' written notice to the principal office of each Local • • • entitled to such notice • • • by majority vote of the members in good standing of such labor organization, voting in a membership referendum conducted by secret ballot • • •".

74. If the aforesaid Convention is to be regarded as a "regular convention", there was no majority vote *of the*

delegates; and if the said Convention is to be regarded as a special convention" (because of the unannounced night session), there was neither a majority vote of the delegates nor the 30 days' written notice to the principal office of the various locals affiliated with Federation.

75. Numerous members of the Local 802 are at the same time members of one, two and three other AFM locals. The same can be said of many members of other locals of Federation. For this reason, the same member voted for and against Recommendation No. 11; in view of the fact that the roll-call *Locals* voted their *members.* A member could, under this arrangement, have been voted four different times: one for each of the four locals to which he belonged. Moreover, these votes were sometimes opposed. Therefore, the method by which Recommendation No. 11 was passed was, on its face, unfair and improper.

76. The "Official Proceedings" of the 66th Annual Convention of the American Federation of Musicians, Third Day, Evening Session, demonstrates that, in addition to the irregularities described above, the roll-call vote resulted in arbitrary splits of Local memberships in the ballots cast by Local 29, Local 58, Local 77, Local 353 and Local 809. The splits were arranged upon the basis of one-third voting for the Recommendation and two-thirds voting against it, or *vice-versa.*

77. Because of the absence from the Convention of delegates of certain Locals (namely, Local 39, Local 107, Local 128, Local 216, Local 222, Local 255, Local 270, Local 312, Local 364, Local 392, Local 416, Local 433, Local 473, Local 479, Local 488, Local 531, Local 573, Local 600, Local 609, Local 636, Local 660, Local 663, Local 682, Local 765 and Local 798), the members of these Locals were not even permitted to vote one way or the other. Since no pre-

vious notice of Recommendation No. 11 was given to the various locals by Federation, no opportunity was presented to these absent Locals to decide on substitute delegates for such an important Convention.

Wherefore plaintiffs respectfully request:

(a) A declaratory judgment declaring illegal, void and of no effect defendant's new and unlawful requirements and rules concerning the aforesaid purported authorization form ("Exhibit A" hereto annexed) and the aforesaid system of making collection directly from sidemen of the said "Local Tax" by use of that form;

(b) A declaratory judgment declaring illegal, void and of no effect defendant's new and unlawful requirements and rules concerning the form hereto annexed as "Exhibit B" and the aforesaid system of making collection of said "Local Tax" directly from sidemen by use of that form;

(c) A preliminary injunction forbidding defendant, its officers, agents and employees from taking any steps to visit reprisals by way of expulsion, fine, penalty or otherwise, upon any sidemen who refuse to execute either of the aforesaid forms, Exhibits A and B, annexed to this complaint; or who refuse to pay said local taxes directly to defendant unless and until defendant's By-laws are duly changed to require such direct payments;

(d) A permanent injunction forbidding defendant, his officers, agents and employees from putting into effect or attempting to enforce in any way without valid amendment of defendant's By-laws, any system of collecting the aforesaid "local taxes" directly from sidemen or leaders;

(e) A permanent injunction forbidding defendant from increasing its membership dues except in conformity with Title I of the Act of 1959;

(f) A permanent injunction enjoining defendant from putting into effect or attempting to enforce in any way the

unlawful resolution of the Federation's 66th Annual Convention which purported to increase "membership dues" of defendant (and other AFM Locals) without compliance with Title I of the Act of 1959;

(g) A preliminary injunction forbidding defendant, its officers, agents and employees from taking steps to coerce execution of deduction authorizations by plaintiffs and other sidemen by means of threats of union penalties or reprisals.

(h) A preliminary injunction forbidding defendant, its officers, agents and employees from attempting to enforce in any way the collection from plaintiffs and other sidemen any increase of "membership dues" as a result of the aforesaid resolution of the Federation's 66th Annual Convention.

(i) Such other and further relief as to this Court seems just and proper.

GODFREY P. SCHMIDT,
Attorney for Plaintiffs.

Dated: New York, N. Y.

VERIFICATION BY ATTORNEY

CITY, COUNTY AND STATE OF NEW YORK:

GODFREY P. SCHMIDT, Esq., being duly sworn, says:

1. I am the attorney for Julius Schwartz, Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, plaintiffs in the within action.

2. I have read the complaint in the within action and know the contents thereof and know the same to be true of my own knowledge, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters I believe it to be true.

3. The reason why this verification is not made by plaintiffs Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, and is made by me is that the said plaintiffs have their residences within counties other than the county wherein my office is located, except plaintiff Herbert Wasserman whose residence, is within the County of New York but who is actually absent from New York County on the date this verification is made.

4. The sources of my information and the grounds for my belief as to all matters not therein stated upon my knowledge are as follows: statements made to me by the said plaintiffs and documents and correspondence in my possession.

GODFREY P. SCHMIDT

(Sworn to before Anthony J. Shovelski August 13, 1963.)

Defendant's Notice of Motion for Summary Judgment in 63 Civil 2442.

(Schwartz R. 109)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sir:

TAKE NOTICE that upon the complaint herein, verified August 13, 1963; the annexed affidavits of Max L. Arons, Guy Scola, and Robert Crothers, all sworn to September 23, 1963, and the exhibits annexed thereto, defendant will move this Court in Room 618 of the United States Court House, Foley Square, New York, on September 26, 1963 at 11:00 A. M., or as soon thereafter as counsel can be heard, for an order under Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

Dated: New York, N. Y.
September 23, 1963

Yours, etc.,

ASHE & RIFKIN,

By DAVID I. ASHE,
Attorneys for Defendant,
305 Broadway,
New York 7, N. Y.
WO 2-3275

To:

GODFREY P. SCHMIDT, Esq.,
Attorney for Plaintiffs,
60 East 42 Street,
New York 17, N. Y.
MU 7-1950

Complaint in 63 Civil 2548

(Wittstein R. 1-23)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE, Plaintiffs, *against* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant.	Civil Action No. 2548

Plaintiffs, complaining of defendant herein by Godfrey P. Schmidt, their attorney, respectfuly allege:

1. This Court has jurisdiction over this cause of action under Title I, especially Sections 101 and 103, of the Labor Management Reporting and Disclosure Act of 1959, hereinafter called the "Act".

2. Plaintiffs are and for years have been members in good standing of defendant union and of one or more of its Locals.

3. Plaintiff Eddie Wittstein is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of Connecticut.

4. Plaintiff Ben Cutler is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good

standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

5. Plaintiff Julius Schwartz is, and for many years has been, a sideman who is regularly employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

6. Plaintiff Marty Levitt is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

7. Plaintiff Claude Garreau (d/b/a Allen Merritt) is a self-employed musician or independent contractor of his own musical services, who usually performs solo but who sometimes acts as an orchestra leader who employs in his orchestra sidemen who are members of defendant Union. He resides in and is a citizen of the State of New York.

8. Plaintiff Bert Fisher is, and for many years has been a sideman who is regularly employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

9. Plaintiff George Auld is and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

10. Plaintiff, Leo Greco, is and for many years has been, an orchestra leader who regularly employs in his orchestra employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of Iowa.

11. Plaintiff, Hector De Rienzo, is and for many years has been, an orchestra leader who regularly employs in

his orchestra employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of North Carolina.

12. Plaintiff, Milton Farowitz, is and for many years has been, a sideman who is regular employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

13. Plaintiff, Matt Gillespie, is and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the Commonwealth of Pennsylvania.

14. All of plaintiffs have played in and accept engagements or employment, respectively, in both the "single engagement field" and the "steady engagement field".

15. Plaintiffs bring this action, for themselves and for all members of defendant union, as a class action under Rule 23 of the Federal Rules of Civil Procedures; this complaint raises issues of rights common to all such members; and plaintiffs fairly represent members of said class.

16. Defendant is a labor union or labor organization within the meaning of the Act. It is affiliated with the AFL-CIO; and its principal office and place of business is located at 425 Park Avenue, New York 22, New York. It is an International union comprising more than 600 local unions throughout the United States and Canada.

17. Purporting to act pursuant to its Constitution and By-laws, defendant, during the period from June 10th to June 13 (inclusive), 1963, conducted its sixty-sixth Annual Convention at the Fontainebleu Hotel in Miami Beach, Florida.

18. Upon information and belief, approximately 1219 delegates (chosen, presumably, pursuant to the Constitu-

tion and By-laws of defendant and of its respective Locals) attended the aforesaid Convention; and these delegates represented 622 Locals of the Federation.

19. Prior to said Convention there was distributed (pursuant to defendant's By-laws) to the said delegates, a printed booklet entitled "Report of President, Secretary, Treasurer and Auditors, Sixty-Sixth Annual Convention of The American Federation of Musicians June, 1963, Miami Beach, Florida."

20. The said printed booklet contained, among other things, the "President's Report" for the year 1962-1963 to the delegates of the said Sixty-Sixth Convention; and that Report contained the following excerpt:

> "All local officers and members have been repeatedly informed during the past two years of the law suits directed against the thirty-year-old method of collecting the Federation's traveling surcharge and some locals' taxes. On April 30, 1963, the United States Circuit Court of Appeals in New York ruled against the Federation. The Federation's attorneys are seeking reconsideration of this ruling and, if unsuccessful, they will make immediate application to the United States Supreme Court to review this decision. There will, of course, be a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling, and the Convention may well be obliged to undertake drastic revision of the Federation's fiscal structure."

21. The reference to "law suits" and to "litigation" in the foregoing quotation was to Civil Actions in this Court: namely, 60 Civil 1169, 60 Civil 4025 and 62 Civil 2552. Relevant rulings of the United States Court of Appeals for the Second Circuit are hereto annexed, marked "Exhibit A" and "Exhibit B", respectively, to form part of this complaint; and said rulings were, upon

information and belief, known to the delegates at said Convention.

22. Upon information and belief, after the aforesaid Convention had been in progress for about three days, defendant's officers (at 8:15 P. M. June 12, 1963) distributed to the attending delegates, a proposed resolution in the form of a printed leaflet entitled, "Recommendation No. 11, Recommendation of the Joint Law and Finance Committees", copy of which is hereto annexed, marked "Exhibit C", to form part of this complaint.

23. Defendant's officers "railroaded" this proposed resolution to ballot by the Locals represented at the Convention within a period of less than six hours after distribution of the text thereof to the said delegates.

24. Upon information and belief, the *delegates* at said Convention were initially asked by defendant's officers to vote upon the said "Recommendation" by a voice vote.

25. Upon information and belief, the voice vote was unfavorable to passage of said "Recommendation"; but the Chair ruled, nevertheless, that "The ayes and nayes appear to be of equal response." As a result, defendant's officers, who were running the Convention, arranged for a different voting procedure (as hereinafter described) allegedly "in accordance with the provision of Article 5 of The Constitution" of defendant.

26. The delegates of said Convention were thereafter influenced as hereinafter specified by defendant's officers to vote upon and to pass the aforesaid "Recommendation" or proposed resolution (Exhibit C) by a roll-call voting procedure, under which each Local represented at the Convention was asked to cast as many votes as that Local had members.

27. The aforesaid roll-call voting procedure resulted in a vote which took place in an "unusual night session"

(Exhibit E, *infra*, p. 15) conducted in the early hours (approximately 2 A. M.) of the morning of Thursday, June 13, 1963. Said special session had not been announced prior to the Convention. It began at about 8:15 P. M. on June 12, 1963, and ended at about 2:30 A. M. June 13, 1963.

28. Upon information and belief, at said "night session", 158,068 votes were cast for "Recommendation No. 11" (Exhibit C) and 113,742 votes were cast against the "Recommendation". (Local 802, for example, cast 28,438 against the "Recommendation".)

29. Upon information and belief, the number of Locals voting against said "Recommendation No. 11" exceeded the number of Locals voting for it.

30. Defendant's official organ, "International Musician" (in its July, 1963, issue) published the Convention Resolution resulting from the aforesaid "adoption" of "Recommendation No. 11" at p. 7; and a copy thereof is hereto annexed, marked "Exhibit D", to form part of this Complaint.

31. No previous notice of any kind, except as herein above described, was given to the delegates, or to the Locals represented by those delegates, respecting "Recommendation No. 11", its contents or text.

32. The aforesaid roll-call voting procedure, by which "Recommendation No. 11" was railroaded through the aforesaid Convention, was in violation of Section 101, Title I, of the Act, as hereinafter specified.

33. Section 101(a)(3) of the Act requires that an increase of dues and initiation fees by a labor union be enacted only:

> "by majority vote *of the delegates* voting at a regular convention or, at a special convention of such labor organization *held upon not less than thirty days' written notice to the principal office of each*

local or constituent labor organization entitled to such notice or * * * by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot of * * * by majority vote of the members of the executive board or similar governing body of such labor organizations pursuant to express authority contained in the constitution and by-laws of such labor organization." (emphasis added)

34. There was, at the Convention which purported to pass "Recommendation No. 11", no vote of a "majority *of the delegates* voting at a regular convention." The *delegates* attending the said Convention did not vote by majority vote. Only the *Locals* voted; and they voted upon the basis of the numbers of their *members* (not of their *delegates*), each Local casting as many votes as it had members.

35. In view of all of its circumstances (especially the character of the announced meeting as an "unusual night session" and the lack of previous notification respecting the test of "Recommendation No. 11") the said night session in fact and in law amounted to a "special convention" within the meaning of Section 101(a)(3) of the Act.

36. Defendant gave no notice of thirty days or more to the principal office of each local affiliated with the defendant respecting defendant's purpose to increase dues and initiation fees nor respecting said "night session" and its agenda.

37. Upon information and belief, the only notice which defendant sent in writing respecting the Convention to the principal office of its constituent locals was that contained in (a) the aforesaid "Report (paragraph 10, *Supra*) and (b) in the April Issue of "International Musician", which did not mention Recommendation No. 11 or its items; and neither of these mentioned a special convention or night session.

38. The basic purpose and reason for Congressional enactment of Section 101(a)(3)(B)(i) of the Act (which defendant violated, as aforesaid) was to give to the officials and members of the constituent Locals of an international union previous notice of the exact terms and conditions of any proposed resolution aimed at increasing dues, initiation fees, general assessments and special assessments. No such notice was given by defendant to its constituent locals.

39. The said roll-call vote violated Section 101(a)(i) of Title I of the Act, because it permitted defendant's Locals to vote the same members two or more times; since many of defendant's members belong to two or more Locals. Thus, the *equal* rights and privileges of many members were infringed and violated by granting *plural* votes to some members.

40. In the process of said roll-call vote, the Act was further violated because the same members' vote was in some cases voted *for* "Recommendation No. 11" by one Local (to which said member belonged) and *against* the "Recommendation" by another Local (to which he also belonged); thus effectively negating that member's vote.

41. As will be observed from the inspection of Exhibit C, hereto annexed, "Recommendation No. 11" was and is a composite or melange of thirteen different resolutions which were arbitrarily combined and presented to the delegates in the form of a "package" (See Exhibit E, *infra*, p. 15); and defendant's officers who controlled the Convention or special convention permitted no division or separate consideration of each of the thirteen items involved. Thus, the delegates were allowed no fair and proper opportunity for consideration of "Recommendation No. 11" because they were presented with a "take-it-or-leave-it" choice.

42. Section 101(a)(I) of Title I of the Act provides in part as follows:

> "Every member of a labor organization shall have *equal* rights and privileges *within such organization* * * * *to vote in elections* * * * *and to participate in the deliberations and voting upon the business of such meetings*, subject to reasonable rules and regulations in such organizations' constitution and by-laws". (emphasis added)

43. In addition, defendant's procedure at the Convention or special convention in passing "Recommendation No. 11", as aforesaid, violated the equal rights of the delegates (who are all members of defendant) as outlined in the quotation from the Act appearing in the previous paragraph of this complaint; because (a) the member-delegates did not have equal rights and privileges within the organization to vote; (b) they did not have an equal or genuine right to participate in the deliberations and voting upon the business before the Convention in the form of "Recommendation No. 11"; (c) the rules and regulations adopted by defendant for the purpose of conducting the Convention or special convention and the "unusual night session" with respect to "Recommendation No. 11" were unreasonable and were effective to suppress rather than to express the free legislative wishes of the assembled delegates.

44. The equality of the member-delegates' rights was further unlawfully prejudiced by the fact that the voting was not by *delegates*, as the Act requires, but by *Locals* (each *Local* casting as many votes as the number of its members). Thus, if a particular Local were represented by *three* delegates, one of whom opposed the "Recommendation", the wishes of at least one of the attending delegates for that Local were not considered or expressed by the balloting nor was such dissident delegate given an equal opportunity to express or to ballot his opposition.

45. As appears from Exhibit E (*infra*) hereto annexed, on said roll-call election, some Locals were permitted by

defendant to split their membership vote in an arbitrary, unfair and discriminatory fashion as follows:

> "Local so-an-so 730 members: We vote 1⅓ *No.* 1⅔ Yes."

46. The members of defendant's Locals represented by said delegates had no notice whatever of the proposal in question ("Recommendation No. 11"); and the delegates went to the Convention and the "night session" without instructions or opportunity for instructions from their members.

47. The delegates had no opportunity to confer with members of their respective locals, prior to the voting on the advisability of "Recommendation No. 11" and its thirteen integral and important parts; and their mature judgment, as delegates assembled at a Convention, was deliberately limited and in many cases suppressed by the manner in which defendant and its officers conducted the Convention or special convention especially its procedures concerning said "Recommendation".

48. Thus, important matters ("Recommendation No. 11" and its thirteen included items) were left, because of the manner in which defendant conducted the meeting and the vote in question, to uninstructed delegates and to a special "unusual night session" (first announced in the morning of June 12, 1963) at the tail-end of the session wherein a vote eventuated in the wee hours of the morning, while delegates were weary, hurried, propagandized by defendant's speakers, and while they were harrassed by unanticipated delay, by their desire to return to their respective jurisdictions, as they had planned before the Convention or special convention, and by their need or desire for the *per diem* checks for Convention expenses which they were to receive under the defendant's By-laws.

49. By so presenting "Recommendation No. 11" to the delegates as a single "package", defendant coerced the

delegates into voting for or against the thirteen disparate matters conglomerated in a single proposed resolution and thus coerced an unfair and invidious choice which, for that very reason, was not a free choice.

50. As appears from the text of "Recommendation No. 11" the delegates were misinformed and misled thereby into regarding the "taxes" based on the earnings of members (the so-called 10% "traveling surcharge", the so-called 10% "Radio and Television Tax" and the so-called "Theatre Defense Fund Tax") as union "*membership dues*", when, in fact, such taxes are not (and were never regarded by defendant, its officers and members as) union *membership dues* during any time prior to the litigation whose effects defendant and its officers sought to evade by said "Recommendation No. 11"; and in any event such falsely alleged "dues", would have been illegal and discriminatory, since some members would pay more than $10,000 per year for such "dues" and others would pay nothing.

51. The "debate" concerning "Recommendation No. 11" was guided by defendants officers in such a manner as to prevent a parliamentary division and to suppress all effective opposition to the "Recommendation" and to its conglomerate character.

52. Hereto annexed, marked "Exhibit E", to form part of this complaint, is a copy of the publicity disseminated by defendant concerning the said Convention and special convention as well as said "Recommendation No. 11" (in the form of a report appearing in the July, 1963 issue of "International Musician", pages 8-10, 15-16 and 44).

53. Under its Constitution, defendant's Locals, where they have 150 members or less, were entitled to one delegate at the aforesaid sixty-sixth Convention; and attending Locals were entitled to one delegate for each 100 members or major fraction thereof, not exceeding three delegates for any single Local.

54. Under defendant's constitution, each Local at a convention may, upon roll-call, cast as many votes as it has members on questions affecting a change in defendant's "laws"; but all "laws" so passed must be referred to an overall convention committee consisting of the Executive Board of defendant and the chairman of all convention committees. Such overall committee may sanction or veto such a change in union "laws"; and the action of such overall convention committee is final and binding upon all of the members of defendant.

55. Upon information and belief, "Recommendation No. 11", after it had been passed by the vote of the Locals as aforesaid, was not sanctioned nor vetoed by any such overall convention committee. But even if it were, it could not thereby be legitimated, in view of the aforesaid violation of the Act and the violations of defendant's By-laws hereinafter set forth.

56. Under defendant's By-laws, delegates or Locals desiring to introduce to a convention any resolution or measure (such as "Recommendation No. 11") are required to forward such resolution, in written, duplicate form, to defendant's Secretary not later than fifteen days before the first session of the convention.

57. The By-laws provision described in the previous paragraph of this complaint of defendant's By-laws was not observed, but was violated, by defendant's improper procedures used, as aforesaid, for enactment of "Recommendation No. 11".

58. Defendant's By-laws require that any such resolution or measure (like "Recommendation No. 11") shall be printed, and shall be distributed to convention delegates at the *first* session of the convention.

59. The By-laws provision described in the previous paragraph of this Complaint was not observed, but was violated, by defendant's aforesaid improper procedures for enactment of "Recommendation No. 11".

60. On the morning of Wednesday, June 12, 1963, defendant's officers announced to the delegates that because the joint session of the Law and Finance Committees had worked on their draft (Recommendation No. 11) until the early morning hours of June 12, 1963, and because of the alleged limitations of available printing facilities, the text of the proposed resolution ("Recommendation No. 11") could not be presented to the delegates until much later that day (it was distributed at about 8:15 P. M. on June 12).

61. Defendant's By-laws provide that no alterations or amendments of defendant's Constitution or By-laws may be made unless they are proposed in writing; and such alterations or amendments must receive a majority vote *of the delegates* present to become a law".

62. The By-laws described in the previous paragraph of this complaint were not observed, but were violated, by defendant's aforesaid improper procedures for enactment of "Recommendation No. 11".

63. Defendant's nine-member Executive Board, under it's Constitution, comprises its President, Vice-President, Secretary, Treasurer, and an "Executive Committee" of five members, elected at large.

64. Under defendant's By-laws, defendant's President is required to appoint, for each convention, the following committees:

(1) Credentials Committee

(2) Law Committee

(3) Finance Committee

(4) Measure and Benefits Committee

(5) Good and Welfare Committee

(6) Organization and Legislation Committee

(7) International Musician Committee

(8) President's Report Committee

(9) Secretary's Report Committee

(10) Location Committee

(11) Election Committee

and such other committees as the Convention may direct.

65. Defendant's By-laws as described above were designed, or have the unavoidable effect, to concentrate control over the making of union legislation in the hands of defendant's President or, at least, in the hands of the said President and of defendant's Executive Board, because it enables the President, or the Executive Board and the President, to use the President's power of appointment of convention committee chairmen (who constitute the overall convention committee mentioned, *supra*) to veto any legislation of the convention which displeases said President, or the said President and Executive Board.

66. Thus, the aforesaid provisions of defendant's Constitution and By-laws gave to defendant and its officers, the undemocratic power to defeat the will or wishes of the assembled delegates; and to control the Convention or special convention in the interest of railroading the enactment of "Recommendation No. 11", which was carefully kept under wraps until the last hours of the Convention.

67. Despite numerous authoritative Court decisions condemning as illegal the said "traveling surcharge" and "local taxes", the aforesaid Convention and special convention took no steps to repeal the "local taxes"; and unlawfully permitted the "traveling surcharge" to remain in effect, and to be enforced and collected from orchestra-leader-employers, until January 1, 1964; and defendant, acting as if the decisions of this Court and of the United States Court of Appeals did not exist or had no effect,

are still deliberately and systematically enforcing collection of said "traveling surcharge" from orchestra-leader-employers; and defendant thus puts its members and the reputation of their union under the stigma of contumacy toward Federal Courts and of civil and criminal violation of Federal Statute.

68. Plaintiffs have long opposed said "traveling tax" or "traveling surcharge" as both unfair and illegal and also as a discriminatory burden on some union members who were few in number by comparison with the number of those who never or rarely paid such "surcharge". But plaintiffs claim that the said unlawful exaction should be replaced lawfully, democratically and immediately; and not by a procedure which (a) violates the Act; (b) breaches defendant's own By-laws; (c) deliberately conceals the replacement program until vote on that program was only six hours away; and (d) undemocratically avoids all effective notification to defendant's membership; and (e) contumaciously disregards authoritative decisions of Federal Courts.

69. No reasonable hearing procedures within defendant's organization are available to secure for plaintiffs the relief herein sought; and the next (Sixty-seventh) Convention is scheduled two years hence; and defendants officers are manifestly committed irrevocably to the challenged Resolution which they furtively rushed through the aforesaid night session.

70. Plaintiffs have no adequate remedy at law.

WHEREFORE plaintiffs respectfully pray this Court for

(A) A declaratory judgment declaring (a) that the aforesaid Convention procedure concerning "Recommendation No. 11" was illegal and that the Resolution in question (Recommendation No. 11) is null and void under the Act and under defendant's Constitution and By-laws; and (b) that the said Resolution which purported to enact "Recom-

mendation No. 11" at said Convention or special convention is null and void; and

(B) Preliminary and permanent injunctions enjoining defendants from carrying into effect the aforesaid Resolution which purported to enact "Recommendation No. 11" (Exhibit C); and

(C) Such other and further relief as this Court deems just and lawful.

Dated: New York, N. Y.
August 23, 1963.

GODFREY P. SCHMIDT
Attorney for Plaintiffs
Office & P. O. Address
60 East 42nd Street
New York 17, N. Y.
Tel: MU 7-1950

Defendant's Notice of Motion for Summary Judgment in 63 Civil 2548

(Wittstein R. 216)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sir:

TAKE NOTICE that upon the complaint herein, dated August 23, 1963; the annexed affidavits of Guy Scola, Max L. Arons, and Robert Crothers, all sworn to September 18, 1963, and the exhibits annexed thereto, defendant will move this Court in Room 2103 of the United States Court House, Foley Square, New York, on September 26, 1963 at 11:00 A.M., or as soon thereafter as counsel can be heard, for an order under Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

Dated: New York, N. Y.
September 18, 1963.

Yours, etc.,

McGOLDRICK, DANNETT, HOROWITZ & GOLUB

By WILLIAM W. GOLUB
Attorneys for Defendant
3 East 54 Street
New York 22, N. Y.
MU 8-7440

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42nd Street
New York 17, N. Y.
MU 7-1950

Defendant's Statement Under Rule 9(g) in 63 Civil 2548

(Wit'stein R. 217-219)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

There is no genuine issue to be tried with respect to the facts material to plaintiffs' claim as appears from the following comparison of the material allega ions of the Complaint and the uncontrovertible facts:

1. The allegation: The delegates at Federation's 1963 annual Convention received less than six hours notice of Recommendation No. 11 (which abolished the Traveling Surcharge and substituted per capita dues effective January 1, 1963) and Recommendation No. 11 was "railroaded" through the Convention (Compln't, pars. 22, 23, 43, 47, 48, 50, 51, 65, 66).

1A. The uncontrovertible facts: At the opening of the Convention on June 10, 1963, each delegate received Recommendation No. Two which had been prepared by the International Executive Board. Recommendation No. Two was submitted to a Joint Law and Finance Committee for study and their recommendation. After the Joint Committee had studied Recommendation No. Two on June 10, 11 and 12, it prepared modifications of Recommendation No. Two which it printed as Recommendation No. 11, which was distributed to the delegates on June 12, 1963. Recommendation No. 11 is identical with Recommendation No. Two in that each of them abolish the Traveling Surcharge and provide for an increase in per capita dues. The sole difference between them with regard to fiscal matters is that under Recommendation No. Two the increase would have been to $8 per annum whereas under Recommendation No. 11, the increase was only to $6 per annum, and certain exceptions in the latter Recommendation were made with respect to life and honorary members. Thus Recommendation No. 11

was nothing more than the embodiment of the Joint Committee's suggested modification of Recommendation No. Two, and the charge that the officers of Federation "railroaded" Recommendation No. 11 through the Convention is without substance in fact. Indeed, long in advance of the Convention, delegates were alerted by Federation's president to the fact that at the Convention they would be asked to consider drastic revisions of Federation's fiscal structure.

2. The allegation: The holding of a night session to consider Recommendation No. 11 was improper (Compl't, pars. 27, 35, 43, 46, 48):

2A. The uncontrovertible facts: The possibility of a night session was adverted to by Federation's president and by the chairman of the Law and Finance Committee on June 10, the opening day of the Convention. The holding of a night session was approved by a vote of the delegates on the morning of June 12, the date when the evening session was held.

3. The allegation: The provisions of Federation's Constitution and By-laws were not followed with respect to the time for distribution of Recommendation No. 11 (Compl't, pars. 56-59, 61, 62).

3A. The uncontrovertible facts: Recommendation No. 11 was not a recommendation of any delegate or local but was the recommendation of the International Executive Board as modified by the Joint Committee. Federation's Constitution and By-laws contains no provision with respect to the time for distribution of recommendations submitted by the International Executive Board or by committees of the Convention. The provisions of the By-laws regarding the time for distributing resolutoins relates solely to resolutions submitted by delegates and locals.

4. The allegation: The provisions of Federation's Constitution and By-laws were not followed with respect

to voting upon Recommendation No. 11. (Compl't, pars. 61-62)

4A. The uncontrovertible facts: The procedure followed in voting upon Recommendation No. 11 was strictly in accordance with Federation's Constitution. A roll-call vote (under which delegates vote in accordance with the membership of their locals) must be taken at the request of five locals or ten delegates. A delegate did request such a vote on behalf of five locals, and a roll-call vote was taken. A substantial majority of the delegates (who cast votes based upon membership in their locals) voted in favor of Recommendation No. 11.

5. The allegation: Officers of the Federation required the delegates to vote on Recommendation No. 11 as a package (Compl't, pars. 41, 49).

5A. The uncontrovertible facts: The delegates on the evening of June 12th voted down a proposal that the resolutions contained in Recommendation No. 11 be voted upon seriatum.

6. The allegation: The Convention Committee (consisting of the International Executive Board and the chairman of all Convention Committees) did not approve of Recommendation No. 11 as is required by Article 5 of Federation's Constitution (Compl't, par. 55).

6A. The uncontrovertible facts: The Convention Committee approved Recommendation No. 11 on June 13, 1963.

We do not admit the relevancy or materiality of any of the allegations of the Complaint controverted herein.

McGoldrick, Dannett, Horowitz & Golub

By Emanuel Dannett

Attorneys for Defendant

Office & P. O. Address

3 East 54 Street

New York 22, New York

MU 8-7440

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 220-234; 246a-246g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am the Assistant Secretary of defendant American Federation of Musicians of the United States and Canada (the "Federation").

2. This affidavit is submitted in support of defendant's motion for summary judgment.

3. Federation is a labor organization affiliated with the AFL-CIO. It is an international union comprising 675 local unions having jurisdiction throughout the United States and Canada. In June 1963, Federation had approximately 282,000 members who perform services primarily as instrumentalists, conductors, arrangers and copyists. Approximately 256,000 are members of only one local; approximately 26,000 are members of two or more locals.

4. A copy of the Constitution and By-Laws of the Federation which were in effect immediately prior to the commencement of Federation's June 1963 annual convention is annexed hereto and marked Exhibit A*.

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* The Constitution and By-Laws were amended at the annual convention held in June of this year. Certain of the amendments which are germane to the instant action will be hereinafter referred to.

Unless otherwise stated, all references in this affidavit to Federation's Constitution and By-Laws are to the Constitution and By-Laws which were in effect immediately prior to the holding of the June 1963 convention.

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

5. Federation's officers consist of its president, Herman D. Kenin; its vice-president, William J. Harris; its secretary, Stanley Ballard; its treasurer, George V. Glancy, and an executive committee, the members of which are Lee Repp, Alfred J. Manuti, Charles H. Kennedy, Hal C. Davis and Walter M. Murdoch (Const., Art. 8, §1). Federation's International Executive Board consists of its president, vice-president, secretary, treasurer and its executive committee (By-Laws, Art. 1).

6. Federation's Constitution contains the following provisions (Art. 5; Art. 6, §§1, 2) regarding the election of delegates, and their voting rights:

"ARTICLE 5—REPRESENTATION AND DELEGATES

All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

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"ARTICLE 6—DELEGATES—HOW ELECTED

SECTION 1. Delegates to the Convention and alternates for those delegates who may be unable to attend the sessions shall be elected by the Locals either at annual, regular or special meetings, or at regular or special elections, but in any event, by secret ballot. At least fifteen (15) days prior to the election of delegates, notice thereof shall be mailed by the Local to the last known home address of each member in good standing.

Elections held in violation of this law are null and void.

SECTION 2. No member shall be permitted to represent more than one Local, nor shall any member be permitted to act as delegate for a Local unless he is a full member in good standing in said Local."

7. Federation customarily holds an annual convention of its delegates in June of each year (Const., Art. 4).*

8. In June 1963 there were 1,176 delegates eligible to vote at the June 1963 annual convention (Exh. B, Official Proceedings of June 1963 annual convention, p. 30).

THE TRAVELING SURCHARGE AND LITIGATION PERTAINING THERETO

9. Article 15 of Federation's By-Laws makes provision for a Traveling Surcharge and its collection and transmission by orchestra leaders to Federation. The Traveling Surcharge has been Federation's main source of revenue for over thirty years. Thus, in 1962, the Surcharge repre-

* The June 1963 annual convention passed a resolution which provides that commencing "with June, 1964 (unless commitments for 1965 proved to be uncancellable) there shall be Biennial Conventions".

sented 64% of Federation's total income. Federation's treasurer made the following report concerning Federation's income for that year (Exh. C, Report of the President, Secretary, Treasurer and Auditors, prepared in connection with the June 1963 annual convention, p. 162):

		Per Cent
"Traveling Orchestra Surcharge	$1,428,538	63.88
Per Capita Tax	379,473	16.97
Federation Initiation Fee	319,179	14.27
All others	109,251	4.88
	$2,236,441	100.00"

10. On or about October 14, 1960, an action entitled Carroll, et al., *v.* Associated Musicians of Greater N. Y. Local 802, et al. (60 Civil 4025; the "Carroll action") was brought in this Court on behalf of orchestra leaders in the single engagement field who claimed that the collection and transmission by them of the Traveling Surcharge to Federation was violative of Section 302 of the Labor-Management Relations Act of 1947 (the "LMRA"). Similar actions have been commenced in other United States District Courts.

11. On or about July 20, 1962, an action entitled Ben Cutler, et al. *v.* American Federation of Musicians, et ano. (62 Civil 2552; the "Cutler action") was also commenced in this Court which similarly challenged the validity of the collection and transmission of the Traveling Surcharge by orchestra leaders such as plaintiff Ben Cutler.

12. I am informed by Counsel that: On or about April 30, 1963 the United States Court of Appeals for this circuit affirmed the judgment of this Court, which had held that the collection of the Traveling Surcharge by orchestra leaders such as Cutler and its transmission to Federation was violative of Section 302 of the LMRA.

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

13. I am informed by Counsel that: On September 16, 1963 a petition for certiorari was filed with the United States Supreme Court by the defendants seeking a review of the judgment of the United States Court of Appeals in the Cutler Action.

DISCUSSION OF CHANGES IN FISCAL POLICY PRIOR TO JUNE 1963 ANNUAL CONVENTION.

14. Subsequent to the commencement of the Carroll action and for a period of approximately two years prior to the June 1963 annual convention, discussions took place at local meetings, at regional conferences of locals, at meetings of the International Executive Board, and at Federation's annual 1962 convention, concerning the possible consequence of a decision holding that the method of collection of the Traveling Surcharge was illegal, and the measure, if any, which would have to be taken to enable the Federation to replace the Traveling Surcharge.

15. On or about December 5, 1962, there was mailed to each member of Federation a 12-page printed message (Exh. D) from President Kenin, dealing with the Traveling Surcharge. He stated, among other things, as follows:

> "There will, I assure you, be no opposition from any Federation official to any change desired by the membership. Nor is there anything I know of that can prevent the Convention from abandoning the surcharge and adopting some new method of maintaining the Federation—if this is its will. Obviously, the only way that a union can evaluate and judge wisely on the critical problem of how much and from whom its revenues should be raised is by full discussion, debate, deliberation, and vote."

16. The June 1963 annual convention was scheduled to commence on Monday, June 10, 1963. In preparation for

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the convention, a letter (Exh. E) from President Kenin, dated May 7, 1963, was mailed to all local officers. The letter stated:

> "To All Local Officers:
>
> "I have previously advised you of the history and status of the court cases involving the method of collection of the Federation's traveling surcharge and of some locals' taxes. The United States Circuit Court of Appeals, on April 30, 1963, ruled against the Federation in the case known as *Cutler* v. *A. F. M.*
>
> "The Federation's attorneys are seeking reconsideration of this holding by the Circuit Court. If they are unsuccessful, an immediate application will be made to the United States Supreme Court to review the decision.
>
> "There will of course be a full discussion of this litigation at the forthcoming Convention which may well be obliged to undertake drastic revision of the Federation's fiscal structure.
>
> "Meanwhile, I refer you to my message of December 5, 1962, a copy of which is enclosed. Until further word from the Federation, the procedures outlined in the answers to questions 6, 7, 8, 9 and 10 in that letter still apply and should be followed."

17. In further preparation for the Convention, on or about May 24, and 27, 1963, copies of reports (Exh. C) prepared by the president, secretary, treasurer and auditors of Federation were mailed to all delegates to the Convention. The President's report stated, in part, as follows (Exh. C, p. 6):

> "All local officers and members have been repeatedly informed during the past two years of the law suits directed against the thirty-year-old method

of collecting the Federation's traveling surcharge and some local's taxes. On April 30, 1963, the United States Circuit Court of Appeals in New York ruled against the Federation. The Federation's attorneys are seeking reconsideration of this ruling and, if unsuccessful, they will make immediate application to the United States Supreme Court to review this decision. There will, of course, be a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling, and the Convention may well be obliged to undertake drastic revision of the Federation's fiscal structure."

18. During the two weeks preceding the opening of the Convention the International Executive Board met in Miami Beach. On May 30, June 1, 3, 4, 6, 7 and 10, there were extended discussions as to the recommendations to be placed before the delegates with respect to the problems created by the Cutler decisions (see minutes of those meetings set forth in the Official Proceedings, Exh. B, pp. 361-72). The International Executive Board concluded to recommend to the delegates that the traveling surcharges as well as certain other taxes be abolished, and that in their place the prior per capita charge, which aggregated $2.10* per annum, be increased to $8.00 per annum.

19. Those recommendations, together with certain other recommendations of the International Executive Board, were put in the form of a proposed resolution and printed under the heading of "Recommendation No. Two" (Exh. F). Copies of Recommendation No. Two were distributed to all delegates at the opening of the convention on June

* The $2.10 per annum consisted of per capita dues of $1.40; a 60¢ charge for the International Musician, and a 10¢ contribution to the Lester Petrillo Memorial Fund (a fund created to assist indigent musicians).

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10, 1963. Recommendation No. Two contained the following proposed resolutions, to become effective January 1, 1964:

"1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.

"2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $8.00 (inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund).

(b) Federation Per Capita Dues shall not be payable by any Local on travelling or transfer members.

"3. Federation Initiation Fees shall be as follows:

$ 4.00—if Local Initiation Fees are $10.00 or less.

$ 9.00—if Local Initiation Fees are more than $10.00 but not more than $20.00.

$14.00—if Local Initiation Fees are more than $20.00 but not more than $40.00.

$22.00—if Local Initiation Fees are more than $40.00 but not more than $50.00.

$30.00—if Local Initiation Fees are more than $50.00 but not more than $100.00.

$40.00—if Local Initiation Fees are more than $100.00.

"Federation Initiation Fees shall not be imposed upon the induction into any Local of any transfer or traveling member. The present ceiling on Local Initiation Fees shall be increased from $100.00 to $150.00.

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"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $8.00 per annum. Such rates may be reduced with the consent of the International Executive Board.

"5. No Local shall require any member of the Federation who is not a member of such Local to make any payment based on regular periodic dues of such Local unless such member has performed within the jurisdiction of such Local for at least four (4) consecutive weeks. No such payment shall exceed the rate of regular periodic dues of such Local less the amount included therein for Federation Per Capita Dues ($2.00 per three (3) months).

"6. No Local shall require any member of the Federation who is not a member of such Local to pay any dues based upon earnings ('taxes') unless such dues are uniformly imposed by such Local upon its own members; but no such dues shall be payable by traveling members performing recording, symphony, concert and opera services.

"7. Any traveling member failing to pay the lawfully imposed dues of a Local of which he is not a member shall be subject to automatic expulsion from the Federation.

"8. Present provisions establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales shall be reaffirmed."

20. After the International Executive Board had concluded to submit Recommendation No. Two to the convention, conferences attended by Federation officers and delegates of various locals were held in the week prior to the

opening of the convention at which a change in fiscal policy was discussed. Thus, President Kenin addressed a conference of Canadian Locals on June 9 on the subject. The minutes of the conference state:

> "At this point, President Kenin comes in to extend his greetings to the Conference; he makes the delegates acquainted with the financial situation of the Federation. He explains that the traveling musician earning 12% of the revenues pays 63% of the operations. This, he says, is an immoral situation which must cease. He states the Federation will have to rely on the per capita tax to carry on. He mentions that some of our locals' dues are as low as $3.00 per year. We have the right, said he, to tax a man for his work. He cites the charwoman's union who pay $36.00 a year to their national association. We have had an easy road up to now, said he, some locals have built their own homes with other people's money. We shall have to find a new formula. He urges not to get panicky as he feels that locals will be willing to pay a higher per capita tax in order to get the Federation going."

PROCEEDINGS AT THE 1963 ANNUAL CONVENTION

21. At the opening of the convention on June 10, President Kenin delivered an address, a significant portion of which dealt with Recommendation No. Two, The Official Proceedings summarized President Kenin's address, in part, as follows (Exh. B, pp. 31-32):

> "Taking a serious note almost at the commencement of his remarks, President Kenin said the burning question concerned a revision of the A. F. of M.'s fiscal policy.
>
> . . . . . .

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"'We are asking this Convention to grant a change to a responsible per capita dues basis that will insure a continuation of the international union,' he said. The resolution proposing this change will be thoroughly considered and debated with opportunity for all to be heard.

"Lacking this reform, President Kenin warned, the A. F. of M. could be confronted by a dual union problem wherein musician critics of the old surcharge methods may seek to break away and attempt to form a rival union.

"Concluding on the note that a 'great debate' was desirable, President Kenin thanked the delegates for their attention."

22. On the opening day of the convention Recommendation No. Two was referred to a Joint Committee of the Law and Finance Committees. During the course of his opening address, previously referred to, President Kenin informed the delegates that those who wished to appear before the Joint Committee would have an opportunity to do so and that there might be a necessity for night sessions.

23. The Joint Committee, after studying Recommendation No. Two, and hearing the views of various delegates, concluded that Recommendation No. Two should be adopted by the convention, except that it should be modified by providing for per capita dues of $6 per annum, instead of $8 per annum, and by including certain exceptions with respect to life and honorary members.

24. The recommendations of the Joint Committee with respect to Recommendation No. Two, as well as certain other recommendations of that Committee, were printed as Recommendation No. 11 (Exh. G). Recommendation No. 11 contained the following proposed reso-

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lution, among others, concerning the change in fiscal policy to become effective January 1, 1964:

"1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.

"2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $6.00 (inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund).

"However, the present Per Capita of $2.10 shall continue with respect to all present Life and Honorary Members and with respect to all members who under presently existing rules of the Locals will become Life and Honorary Members within one (1) year after the effective date of this recommendation. Thereafter the full $6.00 Federation Per Capita Dues shall be paid by the Locals on such members.

"2. (b) Federation Per Capita Dues shall not be payable by any Local on traveling or transfer members.

"3. Federation Initiation Fees shall be as follows:

If the Local Initiation Fee is $10.00 or less, the Federation Initiation Fee shall be an additional $4.00.

If the Local Initiation Fee is more than $10.00 but not more than $20.00 the Federation Initiation Fee shall be an additional $9.00.

If the Local Initiation Fee is more than $20.00 but not more than $40.00, the Federation Initiation Fee shall be an additional

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$14.00. If the Local Initiation Fee is more than $40.00 but not more than $50.00, the Federation Initiation Fee shall be an additional $22.00.

If the Local Initiation Fee is more than $50.00 but not more than $100.00, the Federation Initiation Fee shall be an additional $30.00.

If the Local Initiation Fee is more than $100.00, the Federation Initiation Fee shall be an additional $40.00

No Federation Initiation Fee shall be assessed on any member who is already a member in good standing of any Local of the A. F. of M. The present ceiling on Local Initiation Fees shall be increased from $100.00 to $150.00.

"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum. Such rates may be reduced with the consent of the International Executive Board.

"5. No Local shall require any traveling member of the Federation who is not a member of such Local to make any payment based on regular periodic dues of such Local unless such member has performed within the jurisdiction of such Local for at least four (4) consecutive weeks. No such payment shall exceed the rate of regular periodic dues of such Local less the amount included therein for Federation Per Capita Dues ($1.50 per three (3) month).

"6. No Local shall require any member of the Federation who is not a member of such Local to pay any dues based upon earnings ('taxes') unless

such dues are uniformly imposed by such Local upon its own members; but no such dues shall be payable by traveling members performing symphony, or opera services.

"7. Any traveling member failing to pay the lawfully imposed dues of a Local of which he is not a member shall be subject to automatic expulsion from the Federation.

"8. Present provision establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales shall be reaffirmed."

It should be noted that the substantive provisions of paragraphs 1-8 of Recommendation No. 11 are identical with those contained in Recommendation No. Two, except for $6, instead of $8, per capita dues, and the exceptions made with respect to life and honorary members.

25. Shortly after noon on June 12, 1963, the Chairman of the Law Committee made a report concerning the work of the Joint Committee. The Official Proceedings contain the following statement regarding his report and the adoption of a resolution to hold a night session (Exh. B, p. 52):

"Chairman Davis of the Law Committee reports that the Joint Committees of Law and Finance met the previous evening until the early hours of the morning and again this morning. He announces that the joint Committees have a recommendation to submit concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place."

"The Committees therefore recommend and Delegate Davis so moves that this Convention consider

an evening session tonight starting at 8:00 P. M. to consider this matter.

"The Motion is seconded and carried."

The possibility of the holding of a night session had been adverted to on the opening day of the session by Delegate Davis. The Official Proceedings state (Exh. B, p. 34):

"A motion was made by Delegate Davis, Local 60, that the Convention reconvene on Tuesday, June 11th at 11:00 A. M. and continue until 4:00 P.M., and that these hours prevail during the Convention which is to be in session every day until adjournment. If the Convention determines an evening session is necessary, such session shall convene at 8:00 P. M.

"No objections."

26. Copies of Recommendation No. 11 were distributed to all the delegates during the late afternoon and early evening of June 12. It was considered by the Convention between the hours of approximately 8:15 P. M. on June 12 and 2:30 A. M. on June 13. During the course of its deliberations, a motion was made that the resolutions in Recommendation No. 11 be considered seriatum, but "without making any decision until the full recommendation has been discussed" (Exh. B, p. 56). This motion was voted down by the delegates (Exh. B, p. 56). After Recommendation No. 11 was submitted to a voice vote of the delegates, the Chairman of the convention announced that "The ayes and nays appeared to be of equal response" (Exh. B, p. 58). A delegate, speaking on behalf of various locals, thereupon requested a roll call in accordance with the provisions of Article 5 of the Constitution*. The Chairman announced

* As noted above, Article 5 provides that "On questions affecting a change in the laws each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. & M."

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that a roll call vote would be taken and that delegates representing locals would have the option of voting as a unit, based upon the membership of their locals, or to split their votes. After the roll call vote was taken, the Chairman announced that 158,068⅔ votes were cast in favor of Recommendation No. 11 and 113,742⅓ were opposed (Exh. B, p. 63).

27. On June 13, 1963, the Convention Committee, which consisted of the officers of the Federation, its International Executive Board and the Chairman of all Committees of the convention, and which met pursuant to the provisions of Article 5 of the Constitution, approved of the adoption of Recommendation No. 11 (Exh. B, p. 77).

28. I have been a member of Local 77, American Federation of Musicians since 1943. I became Secretary of Local 77 in 1943; an Assistant to the International Secretary in 1952 and Assistant Secretary in 1959. I have attended every Convention of Federation from 1944 to date with the exception of the 1952 and 1953 Conventions. As a result of the many years that I have attended Conventions and more particularly as an executive of the Federation, I am fully familiar with the procedures followed by Federation at the Annual Convention.

29. The practice which has been uniformly followed by Federation over the years has been that recommendations proposed by the International Executive Board are submitted to the delegates at the opening of the Convention or at such other times as the delegates at the particular Convention may determine. Furthermore, it has never been the practice of Federation to send such recommendations to delegates in advance of the Convention.

30. The practice of Federation has been for delegates at the Convention to determine whether night sessions will be held. It has never been the practice to notify delegates

in advance of a Convention that night sessions would be held.

31. The procedures followed at the 1963 Convention with respect to the recommendations involved in this action and the procedures with respect to the night session were in strict conformity with the well established past practices of Federation.

32. I attended every session of the 1963 Convention. As Assistant Secretary of the Federation, with rare exception, I attend all meetings of the International Executive Board and I attended almost every meeting of that Board which is referred to in this affidavit. I prepared the minutes of most of the meetings of the International Executive Board. I also receive minutes and reports of Regional Conferences and of meetings of Locals attended by Federation officers. Accordingly, all of the matters referred to herein are either known to me by virtue of my attendance at the sessions and meetings above referred to or are based upon documents which come into my hands as Assistant Secretary.

33. In view of the facts set forth in this affidavit, I specifically deny the following allegations of fact which are contained in the complaint:

(a) that the delegates received less than six hours notice of Recommendation No. 11 (Compl't, pars. 22, 23, 31, 35-38, 47, 48);

(b) that the holding of a night session to consider Recommendation No. 11 was improper (Compl't, pars. 27, 35, 43, 46, 48);

(c) that the provisions of Federation's Constitution and By-laws were not followed with respect to the printing, distribution, and voting upon Recommendation No. 11 (Compl't, pars. 56-59, 61, 62);

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(d) that Recommendation No. 11 was "railroaded" through the Convention and that the officers of Federation exerted improper influence on the delegates with respect to that Recommendation (Compl't, pars. 23, 25, 26, 32, 43, 47, 48, 49, 50, 51, 65, 66);

(e) that officers of the Federation required the delegates to vote on Recommendation No. 11 as a package (Compl't, pars. 41, 49).

WHEREFORE, defendant's motion for summary judgment dismissing the complaint should be granted.

GUY SCOLA.

(Sworn to September 18, 1963.)

(Exhibits omitted)

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 235-43)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MAX L. ARONS, being duly sworn, deposes and says:

1. I am the Secretary of Associated Musicians of Greater New York, Local 802 of the American Federation of Musicians of the United States and Canada.

2. I attended the 1963 annual convention of the Federation as one of the delegates from Local 802 and I am fully familiar with the proceedings at the Convention.

3. I have read the affidavit of Guy Scola, sworn to September 18, 1963, and I concur fully with the facts stated therein. I have personal knowledge of the truth of the matters referred to in paragraphs 1-11, 18-19, 22-27, 29-31 of that affidavit. As to the other matters referred to by Mr. Scola, they are true according to my information and belief, which is based on documents I have seen, reports which have been made to me as Secretary of Local 802, and numerous conversations I have had with officers of Local 802 and the Federation, and various members of the Federation, including fellow delegates to the 1963 annual convention.

4. I state without reservation that the charge in the complaint that Recommendation No. 11 was "railroaded" through the Convention is false. Recommendation No. 11 was passed only after the fullest possible consideration by the delegates, all of whom were given full opportunity to present their views on the question, and I know of no pres-

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

sure brought on me or any other delegates to the Convention to cast our votes one way or the other. Indeed, I and my fellow delegates from Local 802, Hyman B. Jaffe, cast over 28,000 votes on behalf of Local 802 against Recommendation No. 11.

5. It was common knowledge among the delegates well before the Convention even opened that they would have to consider and pass upon suggestions for drastic changes in Federation's fiscal policy and that for two weeks before the Convention the International Executive Board was meeting to consider what, if any, recommendations it would make with respect to this matter. As early as May 7, 1963, more than a month before the Convention, I and all other Local officers received a letter from President Kenin in which he informed us that the Convention would probably have to consider revision of Federation's fiscal policy (Scola Aff. Exh. E).

6. The main topic of discussion among the delegates before and during the first three days of the Convention was the revision of Federation's fiscal policy and "Recommendation No. Two" of the International Executive Board which, as noted by Guy Scola (Scola Aff., par. 19), was distributed to the delegates at the opening of the Convention and which, in respect to fiscal policy, was similar to Recommendation No. 11, except as to the amount of per capita dues and provision for certain exceptions for life and honorary members.

7. I was a member of the Law Committee of the Convention and thus a member of the Joint Law and Finance Committee at which Recommendation No. Two was considered and discussed. During the first three days of the Convention, the Joint Committee held extensive meetings, all of which I attended and at least one of which lasted until the early hours in the morning. At these meetings all

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

delegates who wished to be heard were given a full opportunity to present their views. At all times the discussions of the Joint Committee were free from any improper pressure from the officers of Federation and were conducted with complete fairness to all points of view.

8. After the Joint Committee had concluded its study of Recommendation No. Two of the International Executive Board, the Committee felt that it was desirable, in view of the importance of the question, to print its suggested modifications of Recommendation No. Two in the form of a separate Recommendation of the Committee instead of merely reporting its suggested modifications orally to the Convention. The Committee also felt that the importance of the question warranted holding an evening session of the Convention to consider it. These facts were specifically communicated to the Convention by Delegate Davis, who was Chairman of the Law Committee. (Scola Aff., par. 25) As a result of the Convention's approval of the night session, the Committee caused to be printed Recommendation No. 11, which was distributed to the delegates during the late afternoon and early evening of June 12.

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9. Upon information and belief, on or about July 23, 1963, a letter (a copy of which is annexed hereto as Exhibit A) was sent by Orchestra Leaders of Greater New York to numerous members of Local 802 and other locals of the Federation. That letter states, in part (par. 16):

> "16. In a short while, two additional actions will be launched against the A. F. M. and LOCAL 802, respectively. The first of these two new actions will challenge the legality of the Convention proceedings which resulted in the adoption of 'Recommendation No. 11'. The second will challenge, *on behalf of*

sidemen, the collection of Local 802 Taxes directly from sidemen without amendment of the present (illegal) By-Laws (which require that such taxes be collected by orchestra-leader-employers)."

10. The letter of July 23, which predicted the commencement of an action attacking "the legality of the Convention proceedings which resulted in the adoption of 'Recommendation No. 11'" is dated approximately one month prior to the commencement of the within action, which is clearly the action above referred to in that letter.

11. I am informed by counsel that Section 101(a)(4) of the LMRDA provides that "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party" any action under Title I of the Act.

12. I am informed by counsel that in several actions in this Court against Local 802 and Federation, it has been asserted that Orchestra Leaders of Greater New York ("OLGNY") is an association of orchestra leaders who consider themselves to be employers. I am further informed by counsel that this Court has found a number of them to be employers in the single engagement field in its previous decisions in the Carroll 302 and Cutler actions (60 Civil 1169, 4025 and 62 Civil 2552, respectively).

13. As appears from Exhibit A, OLGNY and many of its "employer" members have been financing, encouraging or participating in this action, although OLGNY is not a party to this action and only two or three of its members are parties.

WHEREFORE, defendant's motion for summary judgment dismissing the complaint should be granted.

MAX L. ARONS

(Sworn to September 18, 1963.)

(Exhibit omitted)

Affidavit of Robert Crothers, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 244-46)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT CROTHERS, being duly sworn, deposes and says:

1. I am the Supervisor of the Information Department of the Treasurer's office of the American Federation of Musicians. I make this affidavit in support of defendant's motion for summary judgment dismissing the complaint herein.

2. On September 18, 1963, Federation received a copy of the September 1963 issue of "Crescendo", the monthly publication of Local 149 of Toronto. On page 11, a copy of which is annexed hereto as Exhibit A, there is a report by the delegates of Local 149 concerning proceedings at the 1963 Federation annual convention.

3. I attended every session of the 1963 annual convention, including every meeting of the Joint Law and Finance Committee. I also attended most of the meetings of the International Executive Board, which were held during the two weeks prior to the convention. The report of the Local 149 delegates, to my own personal knowledge, is a true and accurate description of the events which transpired at the convention.

4. I have read the affidavit of Guy Scola, sworn to September 18, 1963, and I concur fully with the facts stated

therein in paragraphs 3-11, 14-27 and 29-31, which are true to my own personal knowledge.

5. I have read the affidavit of Max L. Arons, sworn to September 18, 1963, and I concur with the facts stated therein in paragraphs 1-2 and 4-8, which are true to my own personal knowledge.

ROBERT CROTHERS

(Sworn to September 18, 1963.)

(Exhibit omitted)

Plaintiffs' Statement Under Rule 9(g) in 63 Civil 2548

(Wittstein R. 178-81)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

SHORT AND CONCISE STATEMENT OF THE MATERIAL FACTS AS TO WHICH PLAINTIFFS CONTEND THAT THERE EXIST GENUINE ISSUES TO BE TRIED.

1. That no interested employer or employer association has, directly or indirectly, financed, encouraged or participated in this action except as a party in violation of Section 101(a)(4) of Title I of the Act; as to which defendant, by the affidavit of Max L. Arons, sworn to on September 18, 1963, falsely avers (paragraphs 11, 12 and 13) that there has been direct or indirect financing in violation of that section.

2. That plaintiffs, Eddie Wittstein, Ben Cutler, Marty Levitt, George Auld, Leo Greco, Hector De Rienzo, and Matt Gillespie, are employers; and that plaintiff, Claude

Garreau, is an independent contractor and as such is self-employed.

3. That plaintiffs, Marty Levitt and Milton Farowitz, are members in good standing of defendant union and are entitled to be so recognized.

4. That all plaintiffs have played in and do accept engagements or employment, respectively, in both the *single engagement field* and the *steady engagement field.*

5. That the delegates at the Federation's 1963 Sixty-Sixth Convention received less than six hours notice of Recommendation No. 11.

6. That Recommendation No. 11 was "railroaded" through the Convention.

7. That in all of the factual circumstances described in the complaint, the holding of the night session to consider Recommendation No. 11 was improper and in violation of the Act, as asserted in the complaint.

8. That with respect to the distribution, consideration and passage of Recommendation No. 11, the provisions of defendant's Constitution and By-laws were not followed.

9. That the voting procedure used for the passage of Recommendation No. 11 violated the Act, because it gave 26,000 members of the Federation a double or triple vote.

10. That the officers of Federation arranged matters at the Convention in a manner to require the delegates to vote on Recommendation No. 11 *as a package.*

11. That Recommendation No. 11, when presented to a voice vote of the delegates was actually defeated by them

in the course of such vote: and that thereupon the President of the Convention *falsely* asserted: "The ayes and the nayes appear to be of equal response."

12. That in fact, the *delegates* did not vote for the passage of the Recommendation No. 11, as they were required to by the Act.

13. That defendant and its officers so conducted the Convention as to maintain complete control and domination over it.

14. That defendant's officers violated their fiduciary responsibility under Section 501 (a) of the Act and their duty as trustees to make full disclosure by failing to give due and proper notice of Recommendation No. 11 and by concealing that Recommendation until very late in the Convention and by waiting until the end of the Convention before proposing to the delegates their proposed solution of a problem which they recognized as existing for more than a year prior to June 10, 1963, when the Convention began and when they finally got down to a proposal of their own.

15. That all of the facts and circumstances preceding and surrounding the "unusual night session" were such as to constitute that "unusual night session" a "special convention" within the meaning of Section 101 (a) (3) of the act.

16. That defendant and its officers intended to deceive and did actually deceive large numbers of the attending delegates at the Sixty-sixth Convention by the language of their Recommendation No. 11. For example: defendant and its officers falsely labeled certain "taxes" as "dues"; and they falsely asserted in Recommendation No. 11 that there was a "present provision establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales," when in fact and in truth there is not

now and there never were such provision, falsely labeled as a "present provision" in paragraph numbered 8 of Recommendation No. 11.

17. That one of the methods by which defendant and its officers maintained complete control and domination over the Sixty-Sixth Convention was by their power of appointment of Convention Committees; and that such power of appointment was exercised in a manner to push Recommendation No. 11 through the convention. Defendant's officers by their selection of committeemen and committee chairmen who could be depended on to do defendant's bidding, dominated the Convention.

18. That defendant's By-laws, in all the factual circumstances, required that Recommendation No. 11 should have been printed and distributed to the Convention delegates, at the very first session (June 10, 1963) of the Convention; and that this By-law, was, in that respect, violated.

19. That the Convention, under the domination and control of defendant and its officers, continued in full force and effect the illegal "traveling surcharge" and "local tax" provisions which had been condemned by authoritative decisions of this Court and of the United States Court of Appeals.

Defendant's Statement under General Rule 9 (g), by contradicting many allegations of the complaint, demonstrates the existence of material issues of fact which need to be tried.

Dated: September 23, 1963.

GODFREY P. SCHMIDT
Attorney for Plaintiffs
Office & Post Office Address at
60 East 42nd Street
New York 17, New York MU 7-1950

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment

(Wittstein R. 182-215)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

CITY, COUNTY AND STATE OF NEW YORK:

GODFREY P. SCHMIDT, being duly sworn, says:

1. I am attorney for plaintiffs herein; and I personally prepared their complaint, which is the subject matter of defendant's motion for summary judgment.

2. This affidavit is prepared for the purpose of calling to this Court's attention certain facts and defendant's admissions which demonstrate that defendant's motion for summary judgment is ill-founded.

3. Several of the allegations of the complaint allege that the Act (especially Title I thereof) was violated by defendant in its enactment of Recommendation No. 11 at defendant's Sixty-sixth Convention; because the equal rights and privileges of defendant's members were violated by the voting procedure employed in that enactment. One of the bases of the complaint was the fact that the ballots of many members were counted by defendant two, three and possible four times, since each Local represented at the Convention was permitted to vote as many ballots as it had members. Thus, in cases where a member belonged to a number of AFM Locals simultaneously, that member's ballot was counted several times. If he belong to two AFM Locals, it was counted twice. If he belonged to three AFM Locals, it was counted three times, Etc. It is significant that the Scola affidavit (Paragraph 3) sworn to on September 18, 1963, and submitted in support of the motion for summary

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

judgment, admits that *approximately 26,000 AFM members belong* to two or more Locals. (Hereinafter the Scola affidavit and its Exhibits will be referred to as follows: "S.A. Para. ..... and S.A. Exhibit .....")

4. The affidavits and exhibits submitted in support of defendant's motion for summary judgment make it clear that prior to and during the Convention defendant and its officers constantly misled the delegates (and members) as to the significance of the decisions of this Court and of the United States Court of Appeals for the Second Circuit on the subject of the 10% "traveling surcharge" and the local taxes. This misrepresentation was material and serious; because it involved the basic question of the actual situation that needed remedy as well as the remedy which the delegates were called upon to adopt to correct the illegalities practiced by the defendant and its officers. Almost from the date of the first decisions adverse to defendant and to Local 802, AFM and Local officers kept repeating *(orally,* in Allegro, in International Musician, in leaflets, in booklets and in other union propaganda) that the only thing the Courts had found was "that the method of collection of the traveling surcharge and of the local taxes was illegal." The entire question of the *employer status* of orchestra leaders and of the consequences of that status was side-tracked and left out of consideration. There was no real explanation of the antitrust actions, of the consequences of the systematic refusal of AFM unions to bargain collectively, of their combinations with employers, of the fact that the above-entitled action involved steady engagements as well as single engagements and of the various findings of this Court. What the Courts actually did was to find that *certain Union By-laws were illegal* because those By-laws placed upon *employers* within the union (orchestra leaders) a duty (a) to pay *taxes (not dues)* for themselves; (b) to collect such taxes from their sidemen-employees (without

any written authorization from those employees); and (c) to pay contributions ("surcharges") into a Local 802 Welfare Fund which clearly violated the Taft-Hartley Act. At no time did defendant or its officers, even though they were and are fiduciaries, ever honestly admit their own error or confront the delegates (or the Locals or their members) with all the relevant facts. Thus defendant's officers in their efforts to save face violated their fiduciary responsibilities to the membership. This face-saving is made plain by the very submission presented by defendant in support of its motion for summary judgment, as hereinafter appears.

5. It is true that, on or about December 5, 1962, defendant mailed a twelve page, printed message from President Kenin to Union members. (S.A. Exhibit E) But this message itself emphasizes and confirms plaintiffs' contention that defendant's officers violated their fiduciary responsibilities under Section 501(a) of the Act by misleading the Convention delegates (and the membership) as to the significance of the decisions of this Court and of the Court of Appeals. For example, on page 2 of "An Important Message from President Kenin about the Surcharge", (S.A. Exhibit E) Mr. Kenin writes:

> "Now, please note this carefully: *the surcharge itself was not attacked. Only the thirty-year-old method of its collection—by the leader-'employer'—was questioned.* In other words, if on a specific engagement, the leader is not an 'employer', no claim was made that anything is wrong in the leader's performing his Federation membership obligation by collecting and transmitting the surcharge for himself and the sidemen." (emphasis in the original)

6. In other words, Mr. Kenin is advising the members, who make no legal distinctions, that (despite the require-

ments of the Taft-Hartley Act as amended) there is no requirement that sidemen employees sign authorization and that a check-off system can be legitimate without a collective bargaining agreement. Moreover, S.A. Exhibit E does what defendant's officers have constantly done: it assures the membership that there is a different rule under Section 302 of the Taft-Hartley Act for steady engagements; and that the Court decisions serve as precedents only for single engagements (as if Section 302 made a distinction between employers in the single engagement field and those in the steady engagement field):

> "The new preliminary injunction only affects surcharge collections on single and 'miscellaneous' engagements from these plaintiff leaders. *It does not apply to steady engagements.* No court has held or even suggested that the surcharge is illegal when applied to steady engagements." (emphasis in the original)

7. This misrepresentation (in the last sentence quoted above) entirely neglects the fact that even in those relatively few steady engagements where the orchestra leader is a genuine *employee*, the Union expects deductions to be made for the "traveling surcharge" without any written, employee authorization. The fact is that most orchestra leaders in the steady engagement field (regardless of the misrepresentations contained in the "Form B" Contract) are genuine employers, just as Cutler is. It is no excuse for an employer's violation of Section 302 to say that he works in the steady engagement field. All such considerations were eliminated from every communication submitted by defendant and its officers to the membership and to the delegates of the Sixty-sixth Convention; and this clearly violated their duty of full disclosure under Section 501(a) of the Act. Thus, delegates were seriously misled and

misguided by defendant's officers in considering Recommendation No. 11. So were members.

8. It is ironic that S.A. Para. 15 quotes from S.A. Exhibit E, the following:

> "Obviously, the only way that a union can evaluate and judge wisely on the critical problem of how much and from whom its revenues should be raised is by full discussion, debate, deliberation, and vote".

There is no doubt about the truth of this statement. It is precisely because the defendant and its officers did not think enough of their fiduciary responsibility to put this truth into effect at the Convention (and before it) that the complaint was filed. The AFM membership and delegates were prevented from evaluating and judging wisely on critical union problems (on which the delegates were called upon to vote) precisely because defendant and its officers misled them as to the significance of Court decisions (to which, even now, they literally pay no attention). There was no "*full* discussion, debate, [or] deliberation," precisely because some of the crucial issues were deliberately concealed or eliminated from consideration by defendant and its officers.

9. S.A. Para. 16 quotes Mr. Kenin's letter (S.A. Exhibit E) dated May 7, 1963. That letter itself corroborates plaintiffs' contention that defendant's officers violated their fiduciary responsibility: and that defendant misled and misguided the delegates, so that they did not really understand the problem that they were expected to vote on:

> "I have previously advised you of the history and status of the court cases involving the method of collection of the Federation's traveling surcharge and of some local's taxes. • • •

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

> *"There will of course be a full discussion of this litigation at the forthcoming convention* • • •
>
> "Meanwhile, I refer you to my message of December 5, 1962 • • • . Until further word from the Federation, *the procedures outlined in the answers to question 6, 7, 8, 9 and 10 in that letter still apply and should be followed."* (Emphasis added)

10. There was no "full discussion of this litigation" at the Convention. Defendant and its officers saw to that. Questions 6, 7, 8, 9 and 10, merely continue the defendant's policy and practice of misinforming membership and delegates:

> "6. Q. Does the new preliminary injunction require any local, other than Local 802, to change its present method of collecting its local taxes?
>
> "A. No.
>
> "7. Q. Does the new preliminary injunction require the Federation or Local 802 to change the present methods of collecting the surcharge or local tax based on 'steady engagements'?
>
> "A. *No, the court specifically denied the plaintiffs' request that the preliminary injunction apply to surcharge and local tax collections on steady engagements. The preliminary injunction applies only to surcharge and Local 802 tax collections on 'miscellaneous' or single engagements."* (emphasis in the original)

11. The uninstructed membership and delegates were allowed to conclude that, simply because the *preliminary injunction* did not apply to any Local except Local 802, all other Locals had a right to violate Section 302 of the Taft-Hartley Act, as amended; and that this violation could be

perpetrated in the steady engagement field by the Federation or its Locals. Members not versed in the law draw no distinction between the mandate of a *preliminary injunction* and the mandate of a *Statute*. Defendant and its officers sought to leave the impression that the prohibitions of *the law* applied only in respect of those plaintiff orchestra leaders who had posted a thousand dollar ($1,000.00 Dollar) bond. That is why defendant and its officers distributed, to the indiscriminate and uninstructed judgment of the members unfamiliar with the law, questions and answers like the following:

> "8. Q. Does the new preliminary injunction apply to collections of surcharge or Local 802 tax from members who have not sued the Federation?
>
> "*A. No. The injunction applies only to those who have taken the step of suing their union and who must each post a $1,000.00 Dollar bond. It does not apply to anyone else.*"
>
> "9. Q. Are other leaders expected to pay the surcharges heretofore?
>
> "A. *Yes, as noted above, the new preliminary injunction applies only to the named plaintiffs in that action. It does not apply to anyone else.* * * *" (emphasis in the original)

The law, and the predecents set by authoritative Court decisions, are negligible trivia under such instructions, which have the inevitable effect of misleading members and delegates who are untrained in the law and uninformed about the significance of the distinction between a preliminary injunction and the mandate of a statute, as authoritatively interpreted by Court decisions. Such misinformation and such failure to inform is the more serious because defendant's officers who were responsible for it were lawyers.

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

12. Defendant (S.A. Para. 17) quotes from reports sent to all of the delegates:

> "There will come of course, a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling * * * [in 62 Civil 2552]." (S.A. Exhibit C)

Defendant admits and plaintiffs can prove, that there was no "full discussion at the Convention of this litigation" and of the "consequences of this unfavorable ruling". Defendant's officers violated their fiduciary responsibilities by misinforming the delegates as to the consequences of the unfavorable ruling and by suppressing important aspects of the litigation as to which full discussion was promised.

13. Defendant (S.A. Para. 18) refers to "extended discussions as to the recommendations to be placed before the delegates with respect to the problems created by the Cutler decisions" (S. A. Exhibit B, pages 361-72). These discussions allegedly took place May 30th and June 1, 3, 4, 6, 7 and 10, 1963. But, according to the very submission made by defendant in support of the motion for summary judgment, these discussions were not made available to the delegates to the Sixty-sixth Convention *until that Convention was over.* They certainly were not made available to the Locals and to the membership until the controlled Convention was concluded. Nor does Scola's affidavit, by referring to these "Minutes of the Meetings of the International Executive Board" in May and June 1963, indicate why he regarded the discussions as "extended". (Hereinafter I refer to the International Executive Board as "I.E.B.")

14. For example, here are the only entries in the May 30, 1963 Minutes that could, remotely, concern the Cutler litigation and the problems created by that litigation:

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

> "A communication is received from orchestra leader Jerry Shard regarding the 10% surcharge. In his letter, member Shard advocates that a greatly increased dues rate be put into effect in lieu of the surcharge * * * Other matters of interest to the Federation are discussed".

This session began, according to the official Minutes, at 2:15 P. M. and adjourned at 5:00 P. M. on May 30, 1963; and it was attended only by members of the I.E.B. (S.A. Exhibit B, p. 361-362).

15. I am unable to find in the Minutes of the International Executive Board for the Meeting held on June 1st, any reference whatever to the Cutler litigation or the problems created by the Cutler decision, despite S.A. Para. 18

16. The I.E.B. Minutes for June 3, 1963, show that only Henry Kaiser, defendant's General Counsel, and Jerime Adler, its New York Counsel and the members of the I.E.B. were present at that meeting; and that the discussion that day was, as reported in S.A. Exhibit B, page 363, indecisive and merely explanatory:

> "Attorneys Kaiser and Adler explain the status of litigation to date, concerning the OLGNY and the AFofM. Legal analysis of the recent decision of the Circuit Court of Appeals is given.
>
> "There is a thorough discussion concerning this entire subject matter and counsel advises that in all probability there will be no final determination in this case before October 1963.
>
> "It is decided that regardless of the outcome of this case, a different type of revenue raising procedure should be enacted.***
>
> "The International Executive Board reverts to a study of the Federation's fiscal policy. Considera-

> tion is given regarding the validity of the Convention authorizing the International Executive Board to act on the subject matter in the event the United States Supreme Court rules on the 10% 'surcharge'. A proposed plan based on an increased per capita tax is thoroughly studied * * *" (S.A. Exhibit B, p. 363)

The "legal analysis of the recent decision of the Circuit Court of Appeals" was never made public to the delegates, or members, or Locals before (or after) the Convention. Despite the fact that the delegates sorely needed information such as this legal analysis would give them, defendant's officers not only avoided such candid disclosure of the legal situation, but also misrepresented the legal situation. The I.E.B. Minutes quoted above were never publicized until after the Convention. Even if they had been publicized, these Minutes would not have been informative or useful to the delegates. The quoted Minutes demonstrate that despite the many months of previous warning given by decisions of this Court, defendant's officers first began seriously to consider a course of action respecting the problems created by the Cutler decision on June 3, 1963, while they were in session at Miami Beach, Florida, making preparation for the Convention which was to begin seven days later: Why didn't these officers publish the "proposed plan" for increased per capita tax (which they say they thoroughly discussed on June 3rd?) on that day or immediately afterwards. Someone had to write this "proposed plan" prior to its consideration on June 3rd. Why didn't defendants officials think enough of their fiduciary responsibility to broadcast in timely fashion at least, something about this plan to increase the per capita tax?

17. After 2:00 P.M. on June 4, 1963, the I.E.B. and attorneys Kaiser and Adler met until 5:30 P.M.; and their

discussion is described in the Minutes (S.A. Exhibit B, p. 366) as follows:

> "Further consideration is given regarding the Federation's fiscal policy and proposed changes in by-laws regarding locals' fight to impose job and other dues. There is a detailed discussion concerning this matter."

Again, this entry would not have been helpful to the delegates had they been given it. Actually, it was first published after the Convention was; and the submission made by defendant in support of its motion for summary judgments indicates that the substance of the discussion thus summarized in the foregoing quotation was never given to the delegates during the Convention.

18. The meeting of the I.E.B. held on June 6, 1963, is especially interesting. The afternoon session began at 2:00 P.M. Then *for the first time* were mere delegates of the 66th Convention permitted to attend the august gathering of I.E.B. members and attorneys Kaiser and Adler. Who were these specially honored delegates? They were (S.A. Exhibit B, page 369) Howard P. Greene of Local 5, Detroit, Michigan; Hal C. Davis of Local 60, Pittsburgh, Pennsylvania; Victor Fuentealba of Local 40, Baltimore, Maryland; David Winstein of Local 174, New Orleans, Louisiana; and Harry Chanson of Local 308, Santa Barbara, California. How did it come about that, out of 1219 Convention delegates, these five delegates were permitted to attend the I.E.B. meeting of June 6, 1963? The answer to this question is that this tight little clique was chosen to work with defendant's officers in controlling and dominating the Convention, as the "Official Proceedings" makes clear they did, and as will become apparent below. Meanwhile, it is important to quote the official description of

what was discussed by or with these gentry (S.A. Exhibit B, page 370):

> "President Kenin explains the Federation's fiscal problem which has arisen in view of the adverse court decisions in the litigations of the Orchestra Leaders v. the A. F. of M.
>
> "The entire assemblage participates in discussions pertaining to this matter.
>
> "Henry Kaiser gives details of various plans to raise revenue.
>
> "The delegation is excused • • •"

19. The I.E.B. Meeting on the next afternoon (June 7, 1963) was even better attended than the meeting on the previous day. It began at 2:00 P. M. Again, privileged delegates were admitted to the high assemblage, along with Attorneys Kaiser and Adler and all of defendant's "Traveling Representatives" and "Assistants to the President" (S.A. Exhibit B, pages 370-371). The delegates privileged to be included in this arcane gathering were:

Victor Fuentealba, who later was chosen by Mr. Kenin as Chairman of the "Good and Welfare Committee."

David Winstein, who later was chosen by Mr. Kenin as Chairman of the "Credentials Committee."

Herb MacPherson, who later was chosen by Mr. Kenin as Chairman of the "Location Committee."

Harry Chanson, who later was chosen by Mr. Kenin as Chairman of the "Finance Committee."

Hal C. Davis, who later was chosen by Mr. Kenin as Chairman of the "Finance Committee."

Howard P. Greene, who later was chosen by Mr. Kenin as a member of the "Law Committee".

Here is the official description of the long discussion which took place between these behind-the-scenes characters:

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

"President Kenin explains the background of the history of the 10% surcharge and the effect of the decision of the Circuit Court of Appeals.

"Attorney Kaiser explains *the proposed fiscal plan* which is fully considered and discussed by all those present.

"Discussion is held with Herb MacPherson, Chairman of 'Location Committee' and delegate Chanson regarding the convention site for 1964. • • •

"Discussion is held regarding personnel managers.

"The session adjourns at 7:00 P. M." (emphasis added)

20. Insistently the questions obtrude: "What was the proposed fiscal plan?" Why wasn't it published before the Convention? Why were five or six select delegates permitted to attend these obrepetitious meetings of the I.E.B. three and four days before the other delegates gathered for the Convention?" The answers are now obvious from the very documents supplied by defendant. Here were the men who, in addition to defendant's officers, were to control the Convention. They all came from influential Locals with relatively large memberships. They were all very close to and friendly with Mr. Kenin and his allied officials of the A. F. of M. They could be relied on. That is why Kenin appointed them to these positions of key importance to the operation of the Convention. It was no accident that at the Convention, a few days afterwards, Mr. Davis was elected as a member of the I.E.B. Nor was it an accident that the Joint Committee, comprising the Law Committee with its Chairman, Hal C. Davis, and the Finance Committee with its Chairman, Harry Chanson, were later entrusted by defendant and its officers with the critical task of approving Recommendation No. 11, the single most important item on the agenda of the Conven-

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tion. Defendant and its officers earnestly desired enactment of Recommendation No. 11. Mr. Kenin adroitly picked a handful of friendly delegates and put them in key positions on controlling committees to dominate the Convention in a manner that would not make it apparent to the delegates themselves that they were being dominated or that it was really the defendant's officers who were dominating them.

21. The leading role played by Davis and the others is clear from many pages of "Official Proceedings". To cite a few instances:

(a) "Delegate Davis, Local 60, moves that this Convention ratify the President's appointment of the 'Credentials Committee' * * *" (S.A. Exhibit B, page 32)

(b) "A resolution was introduced by Delegate Davis, Local 60, that the President appoint the following committees:

Law	23 Members
Finance	23 Members
Measures and Benefits	23 Members
Good and Welfare	23 Members
Organization and Legislation	23 Members
International Musicians	23 Members
President's Report	23 Members
Secretary's Report	23 Members
Location	23 Members

(S.A. Exhibit B, page 33)

(c) "A motion was made by Delegate Davis, Local 60, that the Convention reconvene on Tuesday, June 11, at 11:00 A.M., and continue until 4:00 P.M. and that these hours prevail during the Convention

which is to be in session every day until adjournment. If the Convention determines an evening session necessary, such session shall convene at 8:00 P.M." (S:A. Exhibit B, page 34)

22. Obviously defendant, through its officers and through the select junta of six specially useful and empowered delegates had already planned on June 6 and 7 at the conclaves of the I.E.B. described above that an "evening session" would be needed to railroad through the Convention defendant's Recommendation No. 11. Mr. Davis (*supra* "(c)") very diplomatically and craftily paved the way for an evening session. After all, there is nothing like a long evening session (lasting until 3:00 A.M., according to Exhibit A annexed to the affidavit of defendant's Supervisor, Robert Crothers) to get what you want from tired delegates who lose the will to resistance in proportion as the hour grows later.

23. Delegate Davis of Local 60 proved to be a real work horse for the officers of the A. F. of M. throughout the Convention. He appears everywhere in the "Official Proceedings". He became the Chairman of the Joint Committee which formulated defendant's Recommendation No. 11 and which, of course, nursed it through the Convention. He also participated in doing whatever defendant's officials wanted done. Here are a few examples, from many that could be quoted from the "Official Proceedings":

(a) "Delegate Davis, Local 60, moves that resolutions may be introduced up to 12:00 Noon on Tuesday, June 11.

"The motion is seconded and carried.

(b) "Delegate Davis, Local 60, moves that memorial services be held on Wednesday, June 12 at 11:00 A.M." (S.A. Exhibit B, page 34)

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(c) "The Committee on Law reports through Chairman Davis." (S.A. Exhibit B, page 39)

24. The Minutes of the second day of the Convention show that Mr. Hal Davis' Law Committee was completely successful in all its reports and recommendations. "Resolution No. 11" (not to be confused with "Recommendation No. 11") was opposed by Chairman Davis and his Law Committee reported it *unfavorably*. Of course, "Resolution No. 11" was *not* enacted. (S.A. Exhibit B, pages 39 and 40). Likewise, "Recommendation No. 1" which the Law Committee reported favorably *was* adopted by the Convention. (S.A. Exhibit B, page 40) As to "Resolution No. 3", the report of the Committee was unfavorable and the Convention obligingly adopted the report of the Committee. (S.A. Exhibit B, page 41)

25. Chairman Fuentealba and his "Good and Welfare Committee" were equally successful. That Committee's report was adopted with respect to Resolutions #5, #9, #12, #13, #20 (S.A. Exhibit B, page 49-51)

26. Chairman Davis of the Law Committee again comes into prominence in the following quotation from the Minutes of the Convention:

> "Chairman Davis of the Law Committee reports that the joint committees of Law and Finance met the previous evening until the early hours of the morning and again this morning. He announces that the joint committees have a recommendation to submit concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place.

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"The committees therefore recommend and Delegate Davis so moves that this convention consider an evening session tonight starting at 8:00 P.M. to consider this matter.

"The motion is seconded and carried." (S.A. Exhibit B, page 51)

27. It is obvious from the above that the pattern had been fixed in the pre-convention meetings of the I.E.B. on June 6 and 7 (described above) and that specially favored delegates, like Mr. Davis and the others who had been permitted to attend the I.E.B. camarillas, were cutting the cloth at the Convention to conform with that pattern. Indeed, I have read the "Official Proceedings" of the Sixty-sixth Annual Convention (S.A. Exhibit B) from cover to cover; and I have been unable to find any instance (out of 58 resolutions acted on by the delegates) where the complaisant delegates failed to follow the recommendation of the involved Committee chosen by Mr. Kenin. In a number of instances, proposals, as made by given proponents at certain moments of the Convention, were afterwards conveniently *withdrawn* by those proponents. It is impossible to tell from the "Official Proceedings" who finally persuaded the proponent to withdraw. But in view of the subservience of most of the delegates, it is safe to surmise that the various rigged committees chosen by Mr. Kenin performed their work of dominating and controlling the Convention with great efficiency. It was no mere coincidence that the locals to which Davis, Greene, MacPherson, Fuentealba, Winstein and Chanson belonged voted unanimously for Recommendation No. 11.

28. It is also clear from the "Official Proceedings" (S.A. Exhibit B) of the Convention that at no time before the evening session on June 12, 1963, was any delegate permitted to discuss on the Convention floor defendant's

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Recommendation No. 11; and those "Official Proceedings" indicate that the text of Recommendation No. 11 was submitted to the delegates at the beginning of the "evening session", which is better called the "midnight session".

29. At the "evening session" on June 12, 1963, defendant's Recommendation No. 11 was presented to the assembled delegates by Hal B. Davis, Chairman of the Law Committee, and Harry Chanson, Chairman of the Finance Committee. It will be remembered that the Law Cominittee and the Finance Committee combined to form the "Joint Committee" which reported Recommendation No. 11 favorably (S.A. Exhibit B, page 36).

30. When the convention opened Mr. Kenin addressed it. The beginning of his remarks are summarized in the Minutes of the opening session (S.A. Exhibit B, page 31) as follows:

> "Taking a serious note almost at the commencement of his remarks, President Kenin said that the burning question concerned a revision of the A. F. of M.'s fiscal policy * * *"

The affidavits submitted by defendant in support of the motion for summary judgment constantly emphasize the importance of one single issue before the Convention. Mr. Max Aaron says that it was the "main topic of conversation" of the delegates for the first three days of the Convention. One would have imagined, in these circumstances, that extended debate of that issue and topic would have followed, especially after Mr. Kenin himself had stated that a "great debate" was desirable in this connection. But the Minutes of the Convention (S.A. Exhibit B, page 58) make it quite clear that there was no great debate:

> "The Convention reverts to consideration of Recommendation No. 11.

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> "Discussed by Delegates Ken Cantanzarito, Local 624; Hogan, Local 116; Pezzano, Local 85; Dow, Local 42; Liscio, Local 123; Smith, Local 380; Close, Local 146; Herman, Local 47; Jenkins, Local 267; and Chairmen Davis and Chanson.
>
> "Delegate Tomei, Local 77, discusses the matter and proposes that Resolution #16, which he introduced and which he reads, be substituted for Recommendation No. 11.
>
> "The matter is discussed further by Executive Officer Manutti, and Delegates Lambkin, Local 161, and Hoffman, Local 771.
>
> "The previous question is called for and carried. The Chair puts the question * * *".

Only fifteen delegates (S.A. Exhibit B, p. 58) out of 1219, were permitted to make comments on this all-important Recommendation No. 11. That is deplorable enough as an indication of railroading. But the conclusion that Recommendation No. 11 was ram-rodded through the Convention is startlingly confirmed when it is pointed out that of the fifteen delegates privileged to discuss the Recommendation, nine were hand-picked because they were sympathetic to the administration or part of it. Here are the details:

1. Dow of Local 42 had been appointed by Kenin to the Election Committee (S.A. Exhibit B, p. 45).

2. Catanzarito of Local 624 was selected by the administration for and was elected as an AFM Delegate to the AFL-CIO (S.A. Exhibit B, p. 57).

3. Hogan of Local 116 had been appointed by Kenin to the Committee on Measures and Benefits (S.A. Exhibit B, p. 33).

4. Smith of Local 380 had been appointed by Kenin to the Good and Welfare Committee (S.A. Exhibit B, p. 33).

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5. Davis of Local 60 had been appointed by Kenin as Chairman of the Laws Committee (S.A. Exhibit B, p. 33).

6. Chanson of Local 308 had been appointed by Kenin as Chairman of the Finance Committee (S.A. Exhibit B, p. 33).

7. Manuti of Local 802 is and was a member of the I.E.B. (S.A. Exhibit B, p. 57).

8. Hoffman of Local 771 had been appointed by Kenin, Chairman of the Presidents' Report Committee (S.A. Exhibit B, p. 34).

9. Herman of Local 47 had been appointed by Kenin to the Measures and Benefits Committee (S.A. Exhibit B, p. 33).

In other words, defendant's officers conducted the Convention debate on Recommendation No. 11 by stacking the arguments in favor of passage. Nine delegates (all administration reliables) out of the fifteen delegates allowed to speak on the subject were clearing under the influence of the administration which had appointed them to strategic positions in the Convention. They were, upon the basis of their backgrounds and connections, manifestly slanted in favor of the administration and its predelictions. The Minutes of the "evening session" (S.A. Exhibit B, p. 58) do not show what these nine delegates (administration reliables) said. But, no matter what they actually said, defendant's officers could, on the basis of their previous appointments, rely on them. Permission granted to these nine (out of fifteen) to speak on the principal question before the Convention is itself evidence of railroading. Mr. Kenin's invitation to "full discussion" and a "great debate" magically became genuine cloture under the clever manipulation of the Convention delegates perpetrated by defendant's officers and their influential cohorts, whom they

had appointed to key positions and to whom they allowed special or preferred opportunities.

31. The Minutes of the "evening session" (S.A. Exhibit B, pp. 58-63) support the complaint respecting the unfair splitting of votes on a puzzling ⅔—⅓ basis (and on other bases) having no warrant in law or by-law. The balloting was not by *delegates*, as the law requires, but by *Local memberships*. Incidentally, Scolas' affidavit erroneously asserts that the Convention delegates numbered 1176 (S.A. Para. 8). The "Official Proceedings" state in at least two places, that the number of the delegates totalled 1219 (S.A. Exhibit B, pp. 34 and 57).

32. Defendant claims (S.A. Para. 19) that Recommendation No. 2 (S.A. Exhibit F) was distributed to all delegates at the opening of the Convention on June 10, 1963; and it admits that Recommendation No. 11 (which is different in some respects from Recommendation No. 2) was submitted to the delegates (never to the *members* or to the *locals*) about *six hours before the opening of the "unusual night session"* (which, in the wee hours of the early morning, passed that Recommendation). Extended night sessions are an easy device to lessen resistance and to achieve tired if grudging concessions or consent.

> "After the International Executive Board had concluded to submit Recommendation No. 2 to the Convention, conferences attended by Federation officers and delegates * * * were held in the week prior to the opening of the Convention at which a change in fiscal policy was discussed." (S.A. Para. 20)

Scola is careful to leave to speculation the exact date when the I.E.B. "had concluded to submit Recommendation No. 2 to the Convention". He simply says: "*After*"; he does

not give the date. S.A. Exhibit B, ("Official Proceedings") page 371, lets the cat out of the bag. I.E.B. met on June 10, 1963, and was called to order by President Kenin at 7:30 A.M.:

> "Discussion is held regarding Recommendation No. 2.
>
> "It is agreed that Recommendation No. 2 shall be amended to eliminate that section dealing with exempting traveling musicians from payment of local taxes on recordings.
>
> "Discussion is held regarding whether per capita tax should apply on life members. It is agreed that this proposed increase in per capita tax shall apply on life membership, but shall apply on the life memberships granted one year after the effective date of this Resolution.
>
> "Discussion is held regarding the possibility of imposing a work dues amount based on earnings.
>
> "Study is made as to method of legally collecting such job dues.
>
> "The recommendation is that a member who fails to pay work dues is automatically suspended from membership . . .".

In other words, these efficient, alert and perspicacious leaders of Federation waited until the opening day of the Convention, (June 10th) before they paid any practical attention to this Court's decisions and to the decisions of the Court of Appeals and before they thought of informing the delegates as to their proposal for handling the problems created by the Cutler decisions. This is clear from S.A. Para. 20 and from the quotation from an address by President Kenin to a conference of Canadian Locals on June 9th:

> "He explains that the traveling musician earning 12% of the revenues pays 63% of the operations.

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> This, he says, is an immoral situation which must cease * * *. We have had an easy road up to now, said he, some locals have built their own homes with other peoples money. *We shall have to find a new formula.*" (emphasis mine)

For more than twenty years, defendant's officials were faced with this "immoral situation" and they did nothing. For five years, Mr. Kenin, himself, as President of the Federation, was conversant with this "immoral situation" and he did nothing. Now, on June 9th, 1963, the day before the Sixty-sixth Convention, he comes up with the amazing and belated realization: "We shall have to find a new formula"! He doesn't even say that one has been found or that one will be proposed. The fact that he had no solution on June 9th, and the fact that (as Scola says) the Executive Board had concluded *(when,* he does *not* say) to submit Recommendation No. 2 to the Convention leads inevitably to the conclusion that Kenin wanted the Canadians to think that, if it had come to such a decision, the I.E.B. did so on June 10th, (in view of the quotation made above from the June 10th Minutes of the International Executive Board Meeting Minutes). It is probably nearer the truth to say that the decisions were made at the I.E.B. meetings on June 6th and 7th and that Kenin was concealing this from the Canadians.

33. Nor was Mr. Kenin's address of June 10th, at the opening of the Convention, enlightening:

> "We are asking this Convention to grant a change to a responsible per capita dues basis that will insure a continuation of the International Union, he said. The Resolution proposing this change will be thoroughly considered and debated with opportunity for all to be heard." (S.A. Para. 21)

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34. As indicated above, it was not "thoroughly considered." It was presented for consideration in a context of misrepresentations by which defendant and its officers misguided the Convention and the delegates, as they had previously misguided the membership as well as the Locals.

35. Scola states:

> "On the opening day of the Convention, Recommendation No. 2 was referred to a joint committee of the Law and Finance Committees." (S.A. Para. 22)

If this is true, it was a matter of such small importance that it was not even included in the Minutes of the Official Proceedings for the opening session; nor is there any reference to any debate on that day (despite Mr. Kenin's suggestion that a "great debate" was desirable). No debate on Recommendation No. 2 took place during the opening session, as I am informed by a delegate who attended.

36. Scola asserts:

> "The Joint Committee, after studying Recommendation No. 2, and hearing the views of various delegates, concluded that Recommendation No. 2 should be adopted by the convention * * *". (S.A. Para. 23)

It should be remembered that *all* Convention Committees were appointed by Mr. Kenin, President of Federation. They were, thus, under his influence and control. Scola is not very informative on the number of these "various delegates" whose views were heard. It is common sense that the Convention delegates in any "great debate" on such an important question should have been given full opportunity to express their views. They were not given

that opportunity simply because the plan of defendant and its officers to railroad Recommendation No. 11 through the Convention was efficiently organized, as is even betrayed by Scola's own affidavit. Recommendation No. 11 resulted from the deliberations of the Joint Committee. It was printed and distributed less than six hours before the night session of the Convention (what is really a "special convention") gave its attention to the problems created by the Cutler decisions.

37.

> "Shortly after noon on June 12, 1963 [Mr. Scola inconveniently unspecific] the Chairman of the Law Committee made a report concerning the work of the Joint Committee." (S.A. Para. 25)

Obviously Recommendation No. 11 was the fruit of that "work". The Recommendation could not (as of noon, June 12th) yet have been printed for distribution to the assembled delegates; because the Chairman of the Law Committee, the ubiquitous Mr. Davis, announced "that the Joint Committees have a recommendation *to submit* concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place." (S.A. Exhibit B, p. 51) This indicates that the distribution was yet to be made when Davis made this report at the Third Day Session, called to order at 11:15 A.M. and disbanded after the election of officers (which took place at 3:30 P.M.). Most of this session had already transpired by the time Davis made this report, as appears from S.A. Exhibit B, pages 46-54.

38. Scola says (S.A. Para. 26) that copies of Recommendation No. 11 were distributed "to all of the

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delegates during the late afternoon and early evening of June 12th". Again, Scola is conveniently unspecific. What does "late afternoon" mean? What does "early evening" mean? I am informed and believe, on the testimony of a delegate who was present at the Convention, that the printed text of Recommendation No. 11 was actually distributed to the assembled delegates before the evening session on June 12 began, namely, shortly before 8:15 P.M. Thus, it *is* true, as was alleged in the complaint, that Resolution No. 11 was presented to the assembled delegates less than six hours before the vote by which that resolution was *railroaded* through passage. The Minutes of the night session (S.A. Exhibit B p 58 ff) show clearly how the railroading was accomplished. Here is a Union of 675 locals and 282,000 members (S.A. Para. 3). Here was its 66th Convention, comprising 1176 delegates, according to Scola (S.A. Para. 8), or 1219 delegates (as alleged in this complaint) according to S.A. Exhibit B, p. 57; and the "great debate", to which the President called the Convention, on a matter of such exceeding importance that the very "continuation of the International Union" depended upon it. Yet, only fifteen delegates (including the two Chairmen of the Joint Committees, Davis and Chanson, and Executive Officer Manuti) are permitted to be heard before the "previous question" is called for and carried. Who called for the "previous question" does not appear in the Minutes. But that he was inspired to do so by defendant's officers can safely be assumed.

39. I am informed by a delegate who attended the Sixty-sixth Convention (and I believe) that when Recommendation No. 11 was first submitted to *voice vote* by the delegates, the voice vote was actually in favor of the "nays". However, the Chairman of the Convention dishonestly ruled that the "ayes and the nays appeared to be of equal response."

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40. Scola is at pains to indicate (S.A. Para. 29-31) that the Convention this year was conducted in the same manner as all previous conventions had been conducted. Perhaps there can be little doubt about that. That would simply mean that all previous conventions were under the control and domination of International Officers, too. That could hardly be accidental, in view of the fact that the President of the International appoints all of the committees which make the Conventions tick.

41. Max L. Arons, in his affidavit of September 18, 1963, vigorously denies that Recommendation No. 11 was *railroaded* through the Convention. Hereto annexed marked *"Exhibit A"* to form part of this affidavit is some documentation (written by delegates who attended the Convention) which disagrees with Mr. Arons.

42. If, as Arons alleges, it was "common knowledge among the delegates well before the Convention" that they would have to consider and pass suggestions for drastic changes for the Federation's fiscal policy", no guidance, but rather misrepresentation and misguidance, about the problem came from Federation's officers, who thus violated their fiduciary responsibility under Section 501(a) of the Act. Members were not permitted to see texts of Recommendations to accomplish the so-called "drastic changes". By the manner in which the Convention was conducted, they were prevented from debating the contents of those texts, except as indicated above, in a tiring night session which itself set a limit to debate and wherein exhaustion wrung assent from flagging patience.

43. Arons would have this Court believe (paragraph 6 of his affidavit) that "the main topic of discussion among the delegates before and during the first three days of the Convention were the revision of the Federation's fiscal

policy and Recommendation No. 2 • • • which was distributed to the delegates at the opening of the Convention • • • ". The Minutes of the first three sessions of the Convention do not bear him out. If there was such a discussion, and if it was indeed a "main topic", it was certainly not important enough to record in the Convention Minutes.

44. Arons also states "that, during the first three days of the Convention, the Joint Committee held extensive meetings" Thus, he tries to leave the impression that these "extensive meetings" were concerned largely with the fiscal problem and the Cutler case problem. If this is true, it was deemed a matter of such slight importance by the draftsman of the Minutes of the Convention that those Minutes contain no notations to this effect. Arons fails to state how many delegates wished to be heard or used the opportunity to present their views. He vaguely says that *all delegates who wished to be heard were given full opportunity* to present their views. How *many?* He does not say.

45. Naively, Arons states that at all times the discussions of the Joint Committee were free from improper pressure from officers of the Federation; as if it were plaintiffs' contention that clubs or other uncouth means of violence were defendants' instruments of influence and domination over the delegates. Plaintiffs have more respect for the subtility and craft for the officers of the International than that; especially since the Convention was, as indicated above, run by those officers and their appointees.

46. Arons, too, is evasively unspecific in stating:

> "After the Joint Committee had concluded its study of Recommendation No. 2 • • • the Committee

felt that it was desirable, in view of the importance of the question, to print its suggested modifications of Recommendation No. 2 * * *."

How long after, he does not say. His statement does not disclose when these suggested modifications were printed, except (repeating Scola's formula) that Recommendation No. 11 "was distributed to the delegates during the late afternoon and early evening of June 12th".

47. Arons tries to suggest (paragraphs 11, 12 and 13 of his affidavit) that interested employers or interested employer associations have directly or indirectly financed, encouraged or participated in the preparation of the above-entitled action in violation of the Act. Actually, there had been no financing of the above-entitled action. I have not received any fee for the work that I personally, or my office, put into the draftsmanship of the complaint herein, nor for the work we are putting into these opposition papers. The fact is, however, that Section 101(a)(4) of the Act does not apply here; because the plaintiff employers are obviously *parties* to the action.

48. Arons refers to a communication distributed by the the Orchestra Leaders of Greater New York under date of July 23, 1963, entitled "FACTS WHICH AFM LOCAL OFFICERS AND OTHER MEMBERS SHOULD CONSIDER AGAINST THE BACKGROUND OF THE RECENT CONVENTION." I do not understand what possible connection this statement of demonstrable facts has with the present litigation.

49. I have reserved to the end of this long affidavit the final and perhaps the most conclusive proof of the facts:

(a) That "Recommendation No. 11" was railroaded through the Convention; and

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(b) That Mr. Kenin was guilty of fraud on the delegates and members when, on the voice vote, he ruled that the "ayes" and the "nays" were of equal response.

50. The official "Roll Call" of the Convention lists in a five-column arrangement:

(1) The "Local No.";

(2) The "Local's City";

(3) The "No. Votes Entitled to";

(4) The "Membership"; and

(5) The "Name of Delegate".

It totals (on page 8) the following Convention Statistics:

"Number of Votes	1904
Number of Locals	605
Number of Delegates	1176"

Obviously, this is the source of Guy Scola's figures noted above (S.A. para. 8). A discrepancy exists between these statistics from the official "Roll Call" and those from the "Official Proceedings" (S.A. Exhibit B p 57). But this discrepancy is not the only one presented by a comparison between the Official Proceedings and the Roll Call. The latter, as indicated above, shows that 605 locals had 1904 votes. The Official Proceedings, however, gave 1904 votes to 622 locals. How could this be? S.A. Para. 3 says that there are 675 locals. S.A. Exhibit B p 57 lists a total of 622 locals.

50. The crucial facts gleaned from a comparative analysis of the official "Roll Call", the "Official Proceed-

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ings" and the information given by delegates who were present at the Convention are the following:

1. No Local was entitled to more than 3 *delegates.*
2. No delegation was entitled to more than *10 votes.*
3. The *delegates* who came from the locals which voted *against* Recommendation No. 11 outnumbered the delegates who voted *for* that Recommendation.
4. The *Locals* voting *against* the Recommendation exceeded the number of those *Locals* voting *for* it.
5. The total number of votes which the delegates from Locals *opposing* the Recommendation had a right to cast exceeded by far the total number of votes which the delegates who *favored* the Recommendation had a right to cast.
6. Because the foregoing facts were known to Mr. Kenin from the "nays" (which were louder than the "ayes"), the system of membership-block-voting eighteen Local-blocks were *arbitrarily split;* and the various theories of splitting actually employed were not only arbitrary but inconsistent. For example, Local 24 was entitled to *seven* votes from three delegates. Its membership-block of 684 was voted as follows: 490 Yes and 194 No. By contrast, Local 204, having 541 members, had 3 delegates entitled to cast *five* votes. The membership vote was split as follows: One vote Yes and 540 votes No. Local 177 has 531 members. It sent 3 delegates entitled to cast *five* votes. Its membership was split: 177 Yes and 354 No. Local 77, by contrast, has 4,561 members and was entitled to 10 votes from its *three* delegates. Its membership was voted 3,040⅔ Yes and 1,520⅓ No etc.

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8. *Twenty-six thousand votes were counted more than once;* and of this 26,000, an indeterminate number were counted three times or more (Compare S.A. Para. 3 with S.A. Exhibit B pp. 58-63).

9. The membership-block-voting system was used to railroad Recommendation No. 11, despite the existence of serious questions about its *mathematical* (to say nothing of its *legal*) validity; because

26,000	votes were counted *more than once;*
113,742⅔	votes were counted *against* the Recommendation;
13,870	votes were *arbitrarily split;* and
2,808	votes from locals whose delegates were absent were disregarded on a matter of such importance that it deserved a referendum.
Total 156,420	

51. The cumulative effect of all the irregularities and improprieties reviewed in this affidavit is to make the vote unfair and rigged.

(Sworn to September 25, 1963.)

GODFREY P. SCHMIDT

(Exhibits omitted)

Affidavit of Ernest Neri, Sworn to September 30, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 266-69)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ERNEST NERI, being duly sworn, deposes and says:

1. I am, and for the past thirteen years have been, employed by American Federation of Musicians of the United States and Canada (the "Federation") as Supervisor of the I.B.M. Department.

2. As part of my duties as Supervisor of the I.B.M. Department, it is my responsibility to keep accurate files and records of the names, addresses and Local affiliations of all of the members of the Federation. My immediate superior is Stanley Ballard, Secretary of the Federation, and in his absence my immediate superior is Guy Scola, Assistant Secretary of the Federation.

3. In 1959 Mr. Ballard informed me that as a result of the fact that certain members of the Federation were members of more than one Local, those persons were receiving more than one copy of the International Musician, an official monthly publication of the Federation. Mr. Ballard requested that I ascertain the names of those members of the Federation who belong to more than one Local of the Federation.

4. Pursuant to instructions from Mr. Ballard, I prepared and forwarded to each Local a list of the members of that Local, and a letter (Exhibit A) requesting that each

Affidavit of Ernest Neri, Sworn to September 30, 1963. Read in Support of Defendants' Motions for Summary Judgment.

Local send us the Social Security numbers of their members, except for Canadian Locals, since Canada has no Social Security.

5. All of the Locals of the Federation in the United States sent back to us the list I had prepared of their members, together with the Social Security numbers of all of their members who had Social Security numbers. I then placed the appropriate Social Security number on the I.B.M. card of each member of the Federation. Thereafter, I ascertained, through use of the I.B.M. machines, the name of each member of the Federation whose Social Security number had been listed by more than one Local.

6. After obtaining this information, I created a file which contained the names of all members of the Federation who are members of more than one Local.

7. Since the study made in 1959, my office has kept the multiple membership file up to date and, in addition, obtained the names of persons in Canada who are members of more than one Local. Furthermore, with regard to the small percentage of persons who do not have Social Security numbers, we have continuously checked our mailing addresses for the International Musician and have included in our multiple membership files those persons who do not have Social Security numbers, but who we have been able to ascertain are members of more than one Local.

8. As a result of the foregoing, the multiple membership file which the Federation maintains contains, as far as we can reasonably ascertain, the names of all the members of the Federation who belong to more than one Local.

Affidavit of Ernest Neri, Sworn to September 30, 1963, Read in Support of Defendants' Motions for Summary Judgment.

9. During the middle of September 1963, Guy Scola, Assistant to the Secretary, requested that I ascertain the number of members of the Federation who are members of two Locals; three Locals; four Locals, etc. Through the use of the multiple membership file of the Federation, I have ascertained that there are 12,381 individuals who are members of more than one Local, and that there are 26,174 duplicate memberships made up as follows:

Individual Members	Number of Different Locals to Which Individual Members Belong	Duplicate Memberships
11,145	2	22,290
1,074	3	3,222
152	4	608
6	5	30
4	6	24
TOTALS: 12,381		26,174

Thus, 12,381 members of the Federation are members of more than one Local.

ERNEST NERI

(Sworn to September 30, 1963.)

(Exhibit omitted)

Affidavit of Guy Scola, Sworn to October 1, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 270-72)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am, and since 1959 have been, Assistant Secretary of the American Federation of Musicians of the United States and Canada (the "Federation"). I make this affidavit as a supplement to my affidavit sworn to September 18, 1963, previously submitted in this action.

2. There are various individuals who belong to more than one Local of the Federation. These individuals pay an initiation fee and dues to each Local to which they belong; are entitled to vote for the officers of the Locals to which they belong; and are entitled to all of the benefits and privileges of each such Local. In addition, the Locals to which they belong, in turn, pay per capita dues based upon all of their members, including those belonging to more than one Local.

3. I assisted in the preparation of the Secretary's Report contained in the Official Proceedings of the 66th Annual Convention of the American Federation of Musicians of the United States and Canada. In that report, the following statement is made:

> "Our membership has increased 4,546 since last year. We now have 281,949 members (26,000 of which are duplications since they belong to more

Affidavit of Guy Scola, Sworn to October 1, 1963, Read in Support of Defendants' Motions for Summary Judgment.

than one local). 6,628 members are in the Armed Forces of the United States and Canada" (p. 125).

4. During the middle of September 1963, pursuant to a request of counsel, I directed Ernest Neri, Supervisor of the I.B.M. Department, to prepare a report showing the number of persons who belong to more than one Local of the Federation. Mr. Neri has informed me that the result of his report shows that there are 12,381 individuals who are members of more than one Local, and that there are 26,174 duplicate memberships made up as follows:

	Individual Members	Number of Different Locals to Which Individual Members Belong	Duplicate Memberships
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS:	12,381		26,174

Thus, 12,381 members of the Federation are members of more than one Local.

GUY SCOLA

(Sworn to October 1, 1963.)

Affidavit of George Meany, Sworn to October 8, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 247-50)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

DISTRICT OF COLUMBIA) ss.:

GEORGE MEANY, being duly sworn, deposes and says:

1. I am President of the American Federation of Labor and Congress of Industrial Organizations and have held this office since the establishment of the AFL-CIO in 1955. Previously I had been Secretary of the American Federation of Labor from 1940 to 1952 when I became President of the American Federation of Labor.

2. The AFL-CIO has been vitally interested in promoting democracy in its constituent unions. In my capacity as President of the AFL-CIO and in my previous positions I have become familiar with the constitutions and practices of a very large number of international labor organizations.

3. I am informed that there is being litigated in the instant action the question as to whether weighted voting by delegates in accordance with the provisions of Article 5 of the Constitution of defendant American Federation of Musicians of the United States and Canada is legal in view of the provisions of Sections 101 (a)(1) and 101 (a)(3)(B) of the Landrum-Griffin Act.

4. I know of my own knowledge that a large number of international labor organizations provide in their constitutions or by-laws that voting at conventions of the international union shall be by delegates weighted according to the number of members of the locals. In most other interna-

tional unions the number of delegates which a local may send to a convention is based on the number of members in the local. In many of those international unions locals which are entitled to more than one delegate at the convention may send a single delegate to the convention to cast the votes of all the delegates which the local is allowed. Those international unions find such provisions necessary because it would be too expensive for some locals to send the full number of delegates permitted yet it is undemocratic and undesirable to reduce a local's representation because of inability to pay for a whole delegation. Indeed, many international unions provide that locals may jointly send a single delegate to vote the strength of all of them, in order to minimize their expenses.

5. In my official capacity as President of the AFL-CIO I testified before the Joint Subcommittee of the House Committee on Education and Labor on Labor-Management Reform Legislation, which was considering proposed legislation which culminated in the enactment of the Labor-Management Reporting and Disclosure Act of 1959. With respect to the provision in the bill which had passed the Senate relating to the methods by which unions could raise dues and assessments, I testified as follows:

> "If we are correct in this assumption as to what the Senate intended, section 101 (a) (3) actually permits changes in dues and assessments by every method which unions generally employ except action by a general executive board or similar body. There is absolutely no reason why an international union should not have the power, by its convention or by convention action, to delegate to its executive board the authority to impose assessments in cases of financial urgency without the necessity of going to the expense of calling a special convention or conduct-

Affidavit of George Meany, Sworn to October 8, 1963, Read in Support of Defendants' Motions for Summary Judgment.

ing a national referendum." Hearings Before a Joint Subcommittee of the House Committee on Education and Labor on Labor-Management Reform Legislation, 1482, 1518 (1959).

At no time before or after my statement did any congressman dispute my statement that the proposed legislation "actually permits changes in dues and assessments by every method which unions generally employ except action by a general executive board or similar body". The House in response to this criticism altered the Senate bill to provide a means by which a general executive board could raise dues and assessments.

6. A convention of an international union is a representative body. The delegates of such a convention represent the members of the locals who elect them to serve as delegates. Members elect their delegates by secret ballot in order that the delegates may effectively represent them at conventions. The weighted roll call vote provided for in Article 5 of Federation's Constitution and in a large number of other international labor union constitutions clearly furthers intraunion democracy. A system whereby the votes of delegates are weighted by the number of members they represent is a most democratic one.

7. In my opinion a determination holding that the provision for weighted voting contained in Article 5 of the Federation's Constitution is invalid would be disastrous to a substantial number of international labor unions whose constitutional procedures would thereby be invalidated and would violate democratic principles.

GEORGE MEANY.

(Sworn to October 8, 1963.)

Affidavit of Guy Scola, Sworn to October 9, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 251-64)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am Assistant Secretary of the American Federation of Musicians of the United States and Canada ("Federation"). This affidavit supplements affidavits previously submitted by me in this proceeding.

2. I have listened to the tape recording of the proceedings of the Convention and have read the annexed transcript of the proceedings relating to Recommendation No. 11, which took place on the evening of June 12, 1963 (Exhibit A). That transcript contains a full and accurate account of all of the statements made by and addressed to the Chairman, regarding the request for a roll call vote, the instructions relating to the mechanics of voting by a roll call vote, and the splitting of votes.

3. As will be noted from the transcript, no question was raised by any delegate with regard to the request made in behalf of five locals of the Federation for a roll call vote; the propriety of a roll call vote; or as to the propriety of splitting votes.

4. I am familiar with the practices of locals of the Federation relating to the election of delegates to the Convention. Every delegate to the Convention is elected by secret ballot.

5. I have tabulated the vote on Recommendation No. 11 upon the basis set forth in Article 5 of the Federation's

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Constitution (viz., each local shall be entitled to one vote for each one hundred members or major fraction thereof, but no local shall cast more than ten votes) where there is no roll call vote.

The result of my tabulation is as follows: 1,044½ votes in favor of Recommendation No. 11, and 829½ opposed to Recommendation No. 11. There were 25 locals with a total number of 30 votes which were either absent or which abstained from voting at the time the roll call vote took place at the evening session on June 12, 1963.

GUY SCOLA

(Sworn to October 9, 1963.)

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention

(Exhibit A, Annexed to the foregoing Affidavit of Guy Scola)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

Tuesday, October 8, 1963
American Federation of
Musicians
220 Mount Pleasant Avenue
Newark, New Jersey
9:30 o'clock a.m.

Delegate: Mr. Chairman, I rise on a point of procedure. I can't tell whether the vote is yes or no so I feel as though the question I asked is still in good taste.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

We are discussing the recommendation which is a pot pourri of several resolutions which have been introduced to the convention; in the event that this resolution would be voted down by the delegation here tonight, would this not mean that the convention's position of considering each resolution is to be left separate and does this have the point of defeating all of these resolutions?

Davis: The judgment of the joint committee members in answer to the query is that if this recommendation of the committee is defeated then we will start from scratch and consider each resolution separately or combine some or in any event we will have to start from scratch if this recommendation is defeated.

Kenin: Microphone 3. Bert—who recognizes——

Delegate: Mr. Chairman, it seems to me—Microphone 3. Mr. Chairman, it seems to me that a matter of such great importance as this to be placed in a voice vote is ridiculous because it's going to be a matter of who outyells who. I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision.

Kenin: Well, a roll call vote is what you are referring to. Any ten delegates or five locals may ask for a roll call vote if you are dissatisfied with the voice vote.

Microphone Number—Merle Snider.

Snider: Merle Snider, Local 368, Reno, Nevada. I call for a roll call vote.

I have Local 269, Harrisburg, Pennsylvania. Local 368, Reno, Nevada. Local 47, Los Angeles. Local 20, Pittsburgh. Local 369, Las Vegas.

Kenin: You mean Local 20, Denver.

Snider: I'm sorry. Pittsburgh. Local 6, San Francisco. And next to that—I have five locals which is required by the Constitution to ask for a roll call vote. This will be verified by the Chair.

Kenin: Yes. The gentleman has stated, Merle Snider has stated to the Chair, he has named the cities; the locals

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

who are here have agreed, evidently. I hear no objections to it.

The roll call vote has been asked for. It's mandatory under the law. Now, we haven't had a roll call vote. I don't recall when we had the last one but we will have it on the basis of local numbers— One starting right down through the list, and somebody speaking for the local and give the chair the—the vote of that particular local.

Kenin: Microphone 5, Tomei.

Tomei: Mr. Chairman, I'd like to ask two questions. One is that in the event that the delegates of the local are divided on the question what happens in that case? Would one man vote?

Kenin: I'm advised, Brother Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call vote you vote the total membership of your local. You have to divide up the membership of your local.

Tomei: The other question, Mr. Chairman,—Mr. Chairman, the other question is will you please explain to the convention what a roll call vote is?

Kenin: Yes. Yes, sir. A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, "Cincinnati votes as follows." That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law.

Now, the secretary will conduct the balloting.

We'll take a moment or two because this is a surprise to us. We have no machine here for it. An adding machine has been brought to the stage. The mechanics are being arranged.

Davis: Mr. Chairman, ladies and gentlemen of the Committee—of the Convention—, may I have your attention,

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

please? While we wait for the mechanics of the roll call vote to be set up I would like to make a Committee announcement.

The Law Committee will meet at nine o'clock tomorrow morning in the Pasteur Room. Will the proponents of Resolution 31 please be available at 9:05 A. M.

The proponents of Resolution Number 30 at 9:20 A. M., and the proponents of Resolution Number 15 at 9:35 A. M.

You will please observe that we will meet at 9:00 o'clock tomorrow morning in the Pasteur, and will the proponents of the three resolutions called please make themselves available.

Thank you.

Jaffe: Mr. Chairman, may I request that this convention recess for a period of ten minutes?

(Shouts of "No")

Mr. Chairman——

Kenin: There doesn't seem to be much enthusiasm for your suggestion.

Jaffe: Mr. Chairman. Hy Jaffe. I represent—I'm Hy Jaffe. I represent also Local 802.

With sudden haste the question is called and this convention was given just one alternative, either accept the report of the committee in its entirety or reject the report of the committee in its entirety.

If you reject the report of this committee in its entirety you are inflicting a grievous injury upon the American Federation of Musicians. If, however, you——

(Shouts: "Out of Order")

—Wait a moment, please. If, however, you voted—you vote for it—in my mind I don't think you are doing the job completely either. This thing was suddenly brought to a vote. I personally would like to examine some of the figures and discuss them with you.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

There is 28,000 votes which we are charged with, a little over 28,000; and I personally think to the best interests of my representing the people in Local 802 as well as discharging my duty here at the convention that I be permitted to make a speech.

(Shouts: No. No.)

Kenin: Brother, Brother. We have been here since eight and all the delegates have been patient with the speakers and I have tried to let everyone speak who I can find at a microphone. The question was asked and the question was put before you. It was voted. A roll call was asked for in legal form. I have a duty to place the matter before you on a roll call basis.

Jaffe: Point of information. Point of information. Point of information. Are these votes to be determined by the figures that you see on your roster or is it the current figures as of June 13th—12th, 1963.

Kenin: The roll call is on the basis of those figures here in the roll call as of Monday—as of Monday as was printed here (unintelligible).

Jaffe: I asked my secretary when he turned those figures in here, I think. (unintelligible portion). However, we have something like forty more reported on that particular deal.

Kenin: We cannot, brother—(unintelligible)—on the basis of that information. There is nothing to check with you about that. (unintelligible)

Voice: Will you explain that thing?

Kenin: Well, I'll do the best I can, Brother. If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)--he stands up and votes. He names that (unintelligible word) local and the number.

Wood: I feel that this is possibly the most important decision.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Kenin: Pardon me. Pardon me. I must get their attention.

Wood: Alan Wood.

Kenin: Delegates, Brother Wood, President of the Toronto Local has asked for your attention. Will you please give it to him.

Wood: Mr. Chairman, Members of the Executive Board and Delegates: I think that this is possibly (unintelligible words) decision that the members of the American (unintelligible words) Musicians will have to make. It may be out of order to discuss a roll call vote but I suggest to you, sir, it's ten after twelve and I also suggest that the delegates here have been here for some four hours plus this afternoon's session, plus this morning's session and I suggest the emotional strain—we are all musicians in heart and we all are emotionally affected. I ask, sir, for the roll call vote in the morning at a designated time from the Chair.

(Shouts of "No".)

Kenin: Brother Wood, many of these delegates have plans which they have made weeks in advance. We're trying to move this thing along and you have heard an expression just on the basis of your comment that there is dissatisfaction. I think it's our duty to go through with it. I think that if you wish——

(Applause and four individual shouts of "No")

Microphone 3——

Tomei: Will these votes be recorded as they are made?

(Voice): Yes, they are recorded.

Tomei: As they're made. Those for and against, from each (unintelligible word) local if it's a local that's a divided local.

Kenin: Brother Ballard will conduct the vote and he will give you instructions as to how you may appear at a particular microphone, just to help us to keep the count up here.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Ballard: May I have your attention, please? We are about ready to begin the roll call. Please let me have your attention. Delegates have come to the stand (unintelligible). I called the persons' names two or three times. The roll call vote allows the local to vote the membership of the entire local—the membership upon which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list.

I'm going to read these local numbers very slowly at least until we can find a way and find out if I can speed it up. I'm going to read it slowly for the purpose that if there is a split vote in any delegation I want to give the other speaker an opportunity to vote the votes he represents in that particular local.

If there are three votes in a local and they have 1500 members and they are split, two of them vote one way and one vote the other; You have two voting 1000 votes one way, and one voting 500 votes the other way. You split your entire delegation, vote just according to the way your delegates representing your local want to vote your votes.

Now, I—I want to warn the delegates the only thing you are entitled to here is to vote. Speak up to the microphone and that's so the tellers can tell which way you are voting. State your local number, city and the way you are voting; either yes, in favor of Recommendation Number 11 or no, in opposition to Number 11. State your Local number, your city and the way you are voting, either yes or no. No exceptions will be permitted because if we start making speeches in connection with 1800 different (unintelligible word), 680 different locals voting, we will be here all night so please confine your remarks solely to yes and no.

Now, will the electrician advise us whether he has turned on the microphones so the delegates may announce their vote over a microphone?

(End of matter transcribed)

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.: CERTIFICATE

I, GERTRUDE WACHTEL, being duly sworn, deposes and says:

(1) I am a shorthand reporter associated with Paul Fromm, CSR, Official Reporter in the New York area for the Federal Trade Commission.

(2) I have acted as shorthand reporter at the National Labor Relations Board.

(3) I heard a tape recording of the proceedings of the convention of the American Federation of Musicians and made complete and accurate notes thereof. These notes were transcribed by me.

(4) The foregoing contains a full and accurate transcript of the tape recording I listened to.

(5) I am in no way interested in the outcome of the litigation involved herein.

(6) I am neither of counsel nor related to any of the parties involved in said litigation.

GERTRUDE WACHTEL

Sworn to and subscribed before me this 8th day of October, 1963.

KATHLEEN E. BOLE
NOTARY PUBLIC OF NEW JERSEY

My Commission expires Apr. 23, 1967

(NOTARIAL SEAL)

Opinion, Findings of Fact and Conclusions of Law
No. 29,321.

(Wittstein R. 438-56)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FABOWITZ and MATT GILLESPIE,

Plaintiffs,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civ. 2548

Opinion

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

63 Civ. 2442

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendants.

Appearances:

GODFREY P. SCHMIDT
Attorney for Plaintiffs
60 East 42 Street
New York, N. Y.

Opinion.

McGoldrick, Dannett, Horowitz & Golub
Attorneys for Defendant American Federation of Musicians of the United States and Canada
3 East 54 Street
New York, N. Y.

Emanuel Dannett,
Herbert D. Schwartzman,
Eugene Mittleman,
Of Counsel.

Ashe & Rifkin
Attorneys for Defendant Associated Musicians of Greater New York, Local 802
305 Broadway
New York, N. Y.

David I. Ashe,
Of Counsel.

Levet, D. J.

These consolidated actions are brought by members of the defendant unions challenging certain recent fiscal enactments of both the parent Federation and its Local 802. The complaint in *Wittstein* challenges the procedure at the Federation's recent annual convention by which a resolution was enacted, purporting to abolish the so-called 10% traveling surcharge tax and substituting therefor an increase in the per capita dues of members of the Federation. The complaint in *Schwartz* is framed in two counts, the second of which is substantially identical to the cause of action asserted in the *Wittstein* complaint. This opinion is expressly directed to govern the disposition of the *Wittstein* complaint and the second count of the *Schwartz* complaint. The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, is sufficiently unrelated to the cause asserted in the *Wittstein* complaint to be the subject of a separate opinion.

Opinion.

The complaints challenge the procedure by which the resolution was adopted as violative of both the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 USC §401 *et seq.*, and the defendant Federation's own Constitution and By-Laws. A declaratory judgment is sought seeking to enjoin the defendant Federation from carrying into effect the resolution on its effective date of January 1, 1964. The Federation has moved for summary judgment.

In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. Article 15 of the Federation's By-Laws requires that Federation members who perform a "miscellaneous out-of-town engagement" be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the "traveling surcharge." The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-Laws provide that the local in whose jurisdiction such engagement is performed must collect the traveling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. In a prior action brought by the plaintiff Cutler, the collection of the 10% traveling surcharge from Cutler, when engaged as an employer in the single engagement field, was held to be violative of Section 302 of the Taft-Hartley Act, 29 USC §186. *Cutler* v. *American Fed. of Musicians*, 211 F. Supp. 433 (S. D. N. Y. 1962), aff'd 316 F. 2d 546 (2 Cir. 1963), petition for certiorari filed, 32 U. S. L. Week 3103 (U. S. Sept. 16, 1963) (No. 473). At the convention, the officers of the Federation sought to abolish the 10% traveling surcharge and substitute therefor an increase in the per capita dues of its 282,000 members.

STATUTES INVOLVED

The pertinent portion of the Act involved is as follows:

"SUBCHAPTER II.—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

"§411. Bill of rights; constitution and bylaws of labor organizations

"• • •

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

"• • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

Opinion.

The defendant Federation is conceded to be a labor organization in an industry affecting commerce as defined in 29 USC § 402(i) and is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of 29 USC § 411(a)(3)(B). See *Cutler* v. *American Fed. of Musicians, supra.*

The relevant article of Federation's Constitution is Article 5 and of the Federation's By-Laws, Article 28. Article 5 is as follows:

"ARTICLE 5—REPRESENTATION AND DELEGATES

"All Locals of this Federation of one hundred and fifth members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Article 28 of Federation's By-Laws in the pertinent parts are as follows:

Opinion.

"ARTICLE 28 — CONVENTION PROCEEDINGS — THE ORDER OF BUSINESS SHALL BE:

"SECTION 1. Appointment of Credentials Committee by the President.
Report of Committee on Credentials.
Standing introduction of Delegates attending Convention for the first time.
Appointment of other committees.
Reading of rough minutes of previous session.
Report of officers.
Communications and bills.
Reports of committees.
Unfinished business.
New business.
Nomination and election of officers.
Installation of officers.
Reading of rough minutes.
Adjournment.

"SECTION 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be *viva voce*, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution.

"SECTION 3. The recommendations made in the official report of the President, Secretary or Treasurer relative to any new law or to any advisable changes in existing laws shall be immediately referred to the Law Committee and shall not thereafter be considered in connection with the report of such officer.

"SECTION 4. Delegates or Locals desiring to introduce in the Convention any resolution or measure must forward same written and in duplicate to the International Secretary, not later than fifteen (15)

days before the day set for the first session of the Convention.

"A. All such resolutions or measures shall be printed and distributed to the delegates at said first session.

"B. In addition, delegates may introduce resolutions until thirty (30) minutes after the closing morning session of the second day of the Convention by presenting same to the Chairman.

"C. All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form.

"SECTION 5. At the annual Convention the President shall appoint the following committees: Finance, Measures and Benefits, Good and Welfare, Organization and Legislation, International Musician, President's Report, Secretary's Report, Location and such other committees as the Convention may direct. As soon as practicable after receiving the list of delegates, the President shall appoint from that list the Credentials Committee and the Law Committee, and from the members of said Law Committee a subcommittee of five to be known as the Appeals Committee.

"SECTION 6. • • •

"SECTION 7. The Committee on Credentials shall examine and report on the credentials of delegates. The chairman of the committee shall take charge of all documents appertaining to the duties of said committee, investigate and report upon the credentials of the delegates immediately after appointment, and the report of said committee shall be disposed of before any other business is transacted.

Opinion.

"A. When the Secretary receives credentials from the locals he shall, when acknowledging receipt of the same to the individual delegates, enclose a sticker which the delegate may attach to his luggage on which is inscribed words encouraging the use of live music.

"Section 8. The Committee on Finance shall annually inspect and investigate the financial affairs of the American Federation of Musicians and accounts of the Secretary and Treasurer of the Federation, as well as the books and accounts of all who may be entrusted with the receipt or expenditure of Federation funds, and shall make a full report in writing of its findings to the Convention of the Federation at which it was appointed.

"Section 9. All other committees created by the Convention shall perform such duties as indicated by their title, and all resolutions introduced shall be referred by the President to the Committee he deems appropriate to receive and act upon such resolution.

"Section 10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted to the Convention by the International Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation not earlier than three weeks and not later than two weeks preceding the opening session of the Convention.

"Section 21. No alterations or amendments to the Constitution or By-Laws (except it is otherwise provided in the By-Laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority

vote of the delegates present to become a law, unless otherwise provided.

"SECTION 22. All amendments and additions to the laws passed by the Federation shall go into effect the fifteenth day of September succeeding the Convention which enacts them. Exempt therefrom are amendments and additions for the enforcement of which the Convention has designated another date than the fifteenth day of September."

As appears in 29 USC § 411(a)(3), "the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members except,—* * *" as provided by said Section 411(a)(3). These methods governing in the case of a labor organization such as defendant Federation are specifically set forth as follows:

"* * * (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

THE CONVENTION'S VOTE

There are no genuine issues as to any material facts concerning the following: At an evening session of the convention commencing at 8:15 P.M. on June 12, 1963, the Joint Committee on Law and Finance submitted its report through Chairman Davis (Law) and Chairman Chanson (Finance) recommending passage of Recommendation No. 11 which *inter alia* abolished the 10% traveling surcharge and substituted therefor an increase in the per capita dues of Federation members. After some discussion and the transaction of other business, Recommendation No. 11 was called for vote. Two voice votes were had, after each of which the Chair was unable to determine whether the "ayes" or "nayes" predominated, stating: "The ayes and nayes appear to be of equal response." No further attempt was made to ascertain how the delegates voted either by a show of hands or by standing. Thereafter, Delegate Snider, alleging to be speaking in behalf of five locals, demanded a roll call vote in accordance with Article 5 of the Federation's Constitution, which provides:

> "On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. of M. • • • Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

The Chair then stated: "• • • The roll call vote has been asked for. It's mandatory under the law. • • •" Delegate Tomei then inquired what procedure was to be followed if "the delegates of the local are divided on the question." The Chair responded:

> "I'm advised, Brother Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call

vote you vote the total membership of your local. You have to divide up the membership of your local." (Scola aff. Oct. 9, 1963, Ex. A, p. 4)

In response to a request to explain what a roll call vote is, the Chair answered:

> "A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, 'Cincinnati votes as follows.' That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law." (*ibid.*)

Again, prior to the vote, the Chair explained:

> "• • • If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)—he stands up and votes. He names that (unintelligible word) local and the number." (Scola aff., id., p. 7)

Later, Secretary Ballard stated:

> "• • • The roll call vote allows the local to vote the membership of the entire local—the membership on which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list." (Scola aff., id., p. 9)

The roll call vote was taken, which resulted in 158,068⅔ votes being cast in favor of Resolution No. 11, and 113,742⅓ votes in opposition. The Chair announced the vote and the session was adjourned at 2:30 A.M.

Opinion.

There are at least 12,381 members of the Federation who are members of more than one Local. They are classified as follows:

	Individual Members	Number of Different Locals to Which Members Belong	Duplicate Membership Voting Strength
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS	12,381		26,174

The defendant relies solely on the computed recorded vote as allocated to the respective Locals on a membership basis and on nothing else. (SM 119, Oct 1, 1963)

THE ISSUE

The issue, therefore, is whether or not the procedure in acting on this resolution increasing the dues complied with Section 101(a)(3)(B)(i) of the Act, 29 U. S. C. §411(a)-(3)(B)(i). There is, of course, no contention that a referendum was taken, subsection (a)(3)(B)(ii), nor is there any contention that the majority vote of the members of the Executive Committee was taken pursuant to express authority to increase dues contained in the Constitution and By-Laws of such labor organization, subsection (a)(3)(B)-(iii). The defendant contends that the vote as above mentioned and as set forth on pages 56-58 of the Official Proceedings complies with the statute (i.e., a passage "by a majority of the delegates voting at a regular convention"); the plaintiffs allege that it does not.

NON-COMPLIANCE WITH THE ACT

Purposes of the Act

One of the purposes of the Labor-Management Reporting and Disclosure Act of 1959 and particularly the so-called "Bill of Rights" (29 USC §§411-415) was "to insure union democracy." (Senate Report No. 187, 1959, U. S. Code Cong. & Ad. News, 2318) In the House Report No. 741 one of the purposes stated was to "Require democratic procedures and safeguards within unions, designed to protect basic rights of union members." (1959 U. S. Code Cong. & Ad. News, 2424) The Senate Report pointed out that effective measures to guarantee internal union democracy cannot be applied to all unions without the coercive powers of government (p. 2322); that "the financial conduct of labor unions and their officers is a proper concern of the Federal Government" and that the rules governing the conduct of the union's business such as dues and assessments payable by the members should be known to all members. (p. 2324) It is obvious that the "intended beneficiary of the Labor-Management Reporting and Disclosure Act of 1959 is the union member." (O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 57 (1959))

Speaking of the above-mentioned House Committee Report No. 741, Freeman, District Judge, in *Horn* v. *Amalgamated Ass'n of Street Employees,* 194 F. Supp. 560, 561 (E. D. Mich. 1961) wrote:

> "This House Committee Report clearly shows that the reporting committee was concerned about instances of lack of 'internal union democracy' and proposed that effective measures for the protection of 'basic rights' could be applied only through powers of the Government. It is evident that the Bill of Rights of the Labor-Management Reporting and Dis-

closure Act of 1959 was the response of Congress to this concern in which the basic rights to be protected as *specifically* set out. • • •''

In an opinion concerning a resolution of a local union to increase dues, Van Dusen, D. J., wrote:

> "The purpose of the Labor-Management Reporting and Disclosure Act (29 U. S. C. A. §401ff.) is to assure that 'labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.' 29 U. S. C. A. §402(a). • • •'' Brooks *v.* Local 30, United Slate Workers, 187 F. Supp. 365, 367 (E. D. Pa. 1960).

In *Nelson* v. *Johnson*, 212 F. Supp. 233, 248 (D. Minn. 1962), particularly involving the fiduciary duties of union officials, Larson, District Judge, in commenting on the purposes of the Act, among other things said:

> "• • • There can, in short, be little doubt that Congress meant to lay its hands upon irregular internal affairs. See e.g., 105 Cong. Rec. 5489 (daily ed. April 16, 1959) (remarks of Senator Ervin); 45 Va. L. Rev. 203-206 (1959) (remarks of Senator Kennedy); see generally Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960). • • •''

The Congressional declaration of findings, purposes and policy contained in Title 29 USC §401 indicates the intent of Congress to require labor organizations and their officials to adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organization. To assist in the effectuation of this

purpose, Congress was not content to pronounce general platitudes but, instead, at least as to increased dues, provided explicit and exclusive methods by which such increases might be authorized. Defendant Federation claims that it produced an equivalent or even a superior or more democratic method, but that, even if true, is not determinative of the validity of the process observed.

In like fashion counsel may well argue that a national direct primary of all party voters might be a more democratic method of selecting a Presidential nominee that the convention method and that a direct poll of all voters would be a more democratic method of Presidential election than the present electoral college system. However, it is not the prescribed method and I believe that there is no doctrine of "equivalents" applicable here. As far as democracy is concerned, the second method, that is, membership referendum by secret ballot, is obviously more democratic than the process actually used.

Although proponents of the bill and others recognized the desirability of minimum interference by government in the internal affairs of the union, the fact is that a number of the provisions of the "Bill of Rights" are "express statutory restrictions and requirements which supersede and invalidate all existing contrary provisions in union-governing laws and must be applied to the form prescribed by the law whether or not a majority of the union membership so desires." Hickey, The Bill of Rights of Union Members, 48 Geo. L. J. 226 (1959). As Mr. Hickey points out, "[b]oth the Senate and the House furthered the intrusion of internal union affairs by incorporating the bill-of-rights provision" (id. at 230) and the third method of increasing dues (Title 29 USC §411(a)(3)(B)(iii)) was inserted by way of amendment to eliminate the necessity of the other more expensive requirements of special conventions and national referenda. (id. at 242)

Title 29 USC §411(b) provides: "Any provision of the constitution and by laws of any labor organization which

is inconsistent with the provisions of this section shall be of no force and effect." "When one becomes a union member, he agrees to be governed by the union constitution, by-laws, and rules *not inconsistent with rights and procedures established by the Act.*" (Emphasis inserted) *Cleveland Orchestra Comm.* v. *Cleveland Fed. of Musicians*, 303 F. 2d 229, 230 (6 Cir. 1962)

The pertinent provision of the Act requiring "a majority vote of the delegates voting at a regular convention" is clearly mandatory. The Act definitely limits the manner of action by stating that the rate of dues and initiation fees, etc. shall not be increased *except* by the methods specified.

As enunciated by La Buy, District Judge:

> "* * * A statute which directs performance of a certain thing in a particular manner, bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person. As was said in Botany Worsted Mills *v.* United States, 278 U. S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379: 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc., R.R. Co. *v.* Reid, 13 Wall. 269, 270, 20 L. Ed. 570; Scott *v.* Ford, 52 Or. 288, 296, 97 P. 99.'" Toledo, P. & W. R.R. *v.* Stover, 60 F. Supp. 587, 593 (S. D. Ill. 1945)

In construing the Act, the court should first look to a plain-meaning of words as they have been actually enacted by Congress. *Hughes* v. *Local 11, International Ass'n of Bridge Workers*, 287 F. 2d 810, 818 (3 Cir.), cert. denied 368 U. S. 829 (1961).

Ranes v. *Office Employees Union*, 317 F. 2d 915 (7 Cir. 1963) has no bearing on the issue here. It held merely that a valid passage by an international union of a resolution increasing the dues of all members (i.e., including those of

all Local members) did not require action by the Local union under Section 101(a)(3)(A) of the Act, 29 USCA §411(a)(3)(A).

It is my conclusion that the convention failed to comply with the mandatory provisions of Title 29 USC §411(a)(3)(B)(i) and that as a result I am forced to declare the action taken increasing dues to be void. Consequently, there is no necessity of determining the alleged violations of the Constitution or By-Laws of the Federation. It is thus evident that the motion of defendants for summary judgment must be denied.

Although the plaintiffs made no cross-motion for summary judgment, the court has authority to grant summary judgment for plaintiffs. *Local 33, Int. Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496 (2 Cir. 1961); *Bell* v. *Waterfront Commission of New York*, 183 F. Supp. 175 (S. D. N. Y. 1960), aff'd 279 F. 2d 853 (2 Cir. 1960); *Dickhoff* v. *Shaughnessy*, 142 F. Supp. 535 (S. D. N. Y. 1956); *Hennessey* v. *Federal Security Administrator*, 88 F. Supp. 664 (D. Conn. 1949); 6 Moore, Federal Practice ¶56.12 (2 ed. 1953).

Consequently, summary judgment for plaintiffs is granted to the following extent:

(1) A declaratory judgment declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 USC §411(a)(3)(B)(i);

(2) The defendants Federation and Local 802 are permanently enjoined from carrying into effect the provisions of Recommendation No. 11 increasing the per capita dues of Federation members.

The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, as heretofore stated, is sufficiently unrelated to the cause asserted in the complaint herein to permit the entry of final

judgment with respect to the *Wittstein* action and the second count in the *Schwartz* action. Accordingly, I expressly direct the entry of a final decree and judgment with respect to *Wittstein* complaint and the second cause of action in *Schwartz*. There is no just reason for delay. All the facts pertinent to the decision on the Federation's actions have been adduced. There is, accordingly, no just reason why final judgment should not be entered. See Fed. R. Civ. P. 54(b); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F. 2d 339 (2 Cir. 1963), cert. denied, 32 U. S. L. Week 3153 (U. S. Oct. 22, 1963).

Settle order and judgment with costs against the Federation within ten (10) days from the date hereof on two (2) days notice.

Dated: New York, N. Y.
October 28, 1963.

RICHARD H. LEVET
United States District Judge

Judgment in 63 Civil 2442.

(Schwartz R. 480-81)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civil. Action 2442

This action having been consolidated for purposes of trial with the action entitled *Eddie Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* (63 Civil 2548), and defendant in each of the actions having moved for summary judgment in its favor,

Upon the complaint herein, the affidavits and exhibits submitted by defendant in support of its motion, dated September 23, 1963, for summary judgment in its favor in this action; the affidavits and exhibits submitted by the American Federation of Musicians of the United States and Canada in support of its motion for summary judgment in 63 Civil 2548; the affidavits and exhibits submitted by plaintiffs in opposition to each of the aforementioned motions; the Opinions, Findings of Fact and Conclusions of Law of this Court, dated and filed October 28 and October

30, 1963; and upon all the proceedings heretofore had herein and in 63 Civil 2548, it is hereby

ORDERED, ADJUDGED AND DECREED that the first claim for relief be and the same hereby is dismissed on the merits; and it is further

ORDERED, ADJUDGED, DECREED AND DECLARED that that portion of Recommendation No. 11 passed at the 1963 Annual Convention of the American Federation of Musicians of the United States and Canada, insofar as it increases the per capita dues of its members, was invalidly enacted under Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a)(3)(B)(i); and it is further

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from carrying into effect the provisions of the foregoing Recommendation No. 11 insofar as they increase the per capita dues of defendant's members; and it is further

ORDERED, ADJUDGED AND DECREED that defendant is entitled to costs in this action.

RICHARD H. LEVET,
United States District Judge.

Dated: New York, N. Y.
November 1, 1963.

Notice of Appeal in 63 Civil 2442.

(Schwartz R. 478)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NOTICE IS HEREBY GIVEN, that Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada, the defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated and entered in this action November 1, 1963, insofar as it grants summary judgment in favor of plaintiffs on the second claim for relief.

Dated: New York, N. Y.
November 1, 1963

ASHE & RIFKIN

By DAVID I. ASHE
Attorneys for Defendant
305 Broadway
New York 7, N. Y.
WO 2-3275

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42 Street
New York 17, N. Y.
Mu 7-1950

Judgment in 63 Civil 2548

(Wittstein R. 341-42)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civil Action 2442

Upon the complaint herein, the affidavits and exhibits submitted by defendant in support of its motion dated September 23, 1963, for summary judgment in its favor; the affidavits and exhibits submitted by plaintiffs in opposition thereto; the Opinion, Findings of Fact and Conclusions of Law, dated and filed October 28, 1963; and upon all the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED, DECREED AND DECLARED that that portion of Recommendation No. 11 passed at the 1963 Annual Convention of defendant, insofar as it increases the per capita dues of defendant's members, was invalidly enacted under Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411(a)(3)(B)(i); and it is further

Judgment in 63 Civil 2548.

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from carrying into effect the provisions of the foregoing Recommendation No. 11 insofar as they increase the per capita dues of defendant's members; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to costs in this action.

Dated, New York, New York
October 30, 1963

RICHARD H. LEVET
United States District Judge

Notice of Appeal in 63 Civil 2548

(Wittstein R. 343)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

NOTICE IS HEREBY GIVEN, that American Federation of Musicians of the United States and Canada, the defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment, dated and entered in this action on October 30, 1963, and each and every part thereof.

Dated: New York, N. Y.
October 30, 1963.

McGOLDRICK, DANNETT, HOROWITZ & GOLUB

By EMANUEL DANNETT
A Member of the Firm
Attorneys for Defendant
3 East 54 Street
New York 22, New York

MU 8-7440

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42 Street
New York 17, N. Y.

[fol. 145aa]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

63 Civil 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE, Plaintiffs-Appellees,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant-Appellants.

Appendix to Appellees' Brief—Filed November 20, 1963

[File endorsement omitted]

[fol. 146]

EXCERPTS FROM TESTIMONY—October 1, 1963

New York,
10.30 o'clock a.m.

Present:

Godfrey P. Schmidt, Esq., Attorney for Plaintiffs.

Ashe & Rifkin, Esqs., Attorneys for Defendant Local 802. By: Eugene Victor, Esq., of Counsel.

McGoldrick, Dannett, Horowitz & Golub, Attorneys for Defendants. By: Emanuel Dannett, Esq., Herbert D. Schwartzman, Esq. and Eugene Mittelman, Esq., of Counsel.

The Court: I would like to consider the Wittstein and Schwartz matters first. Is the affidavit here, Mr. Dannett?

Mr. Dannett: Yes, your Honor.

The Court: This is the affidavit of the supervisor of the IBM Department?

Mr. Dannett: I have two affidavits. One is by Mr. Guy Scola, who previously had submitted an affidavit, and then Mr. Neri, who is the supervisor of the IBM Department who actually made the survey which resulted in the figures which I quoted at least a portion of at the hearing held last week.

The Court: Have you a copy, Mr. Schmidt?

Mr. Schmidt: Yes, I have. It was just given to me.

The Court: Who is here, Mr. Scola?

Mr. Dannett: I have both Mr. Scola and Mr. Neri.

[fol. 147] The Court: Do you want to examine them?

Mr. Schmidt: Yes, I would like to.

The Court: Which one do you want first?

Mr. Schmidt: I will take Mr. Scola first.

The Court: Mr. Scola, will you come up here, please? The clerk will swear the witness.

Guy A. Scola, called as a witness, having been duly sworn, was examined and testified as follows:

By Mr. Schmidt:

Q. Mr. Scola, what is your position in the AFofM?

A. I am the assistant secretary.

Q. How long have you been assistant secretary?

A. Since 1959.

Q. Prior to that, were you a member of the AFofM?

A. Yes.

Q. In what capacity?

A. Prior to 1959, I was assistant to the secretary of the American Federation of Musicians.

Q. How long did you occupy that office?

A. Since 1952.

Q. How long were you a member of the AFofM all told?

A. Since 1943.

Q. Prior to 1952, did you occupy a position in AFofM or one of its locals?

A. Yes, one of its locals.

Q. Which local?

A. Local 77, Philadelphia.

Q. Since you have assumed the duties of your present office, have you attended all of the conventions, the annual conventions of the AFofM?

A. Yes.

Q. Did you attend the 66th Convention?

A. 1963, yes.

Q. Throughout its entire proceedings?

A. Yes, sir.

Q. When did you get down there?

A. June 1st.

• • • • • • •

Q. Mr. Scola, did you execute the affidavit which I am going to hand up to you?

A. Yes, I did.

[fol. 148] Q. That was the affidavit that you swore to on the 18th day—no, I beg your pardon—

The Court: The 1st day of October.

Mr. Dannett: 18th day of September, 1963.

Q. 18th day of September, 1963?

The Court: That is the original?

Mr. Schmidt: Yes.

Q. Did you personally write this affidavit, or did someone else dictate it?

A. I gave all the information in that affidavit.

Q. Did you dictate it, or did someone else dictate it?

A. Counsel prepared that for me.

Q. Counsel prepared it?

A. After I gave him the information.

Q. Did you give him the information to the effect that there were 26,000 members who had membership in two or more locals?

A. Repeat that question again, please? Did I what?

Q. Did you give him any information to the effect that there were 26,000 members of the AFofM who belonged to two or more locals?

A. Yes.

Q. And this is what you meant when you wrote paragraph numbered three of that affidavit?

A. That's right.

Q. Is it true that there were, as of the time that you wrote this affidavit, 26,000 members with two or more memberships in various locals?

A. That is 26,000 members in duplication.

Q. But you didn't say that, did you, Mr. Scola, in your affidavit?

A. I said what is there, that's right, sir.

Q. You said that approximately 26,000 members—26,000 are members of two or more locals; isn't that correct?

A. That's correct, sir.

Q. Is that a correct statement?

A. That is what I said.

Q. Is it a correct statement?

[fol. 149] Mr. Dannett: We concede the statement as set forth in there is not precisely accurate. It should have been dual membership. There are 26,000 dual membership.

Mr. Schmidt: I am not interested in any concession at this point.

Q. I want to know, Mr. Scola, whether your statement, the one I read to you, the one I am pointing out, approximately 26,000 are members of two or more locals—is that correct or not?

A. I gave that information, that is the way I gave it, to the extent that we had 26,000 duplications.

Q. That isn't my question. You didn't answer my question.

Mr. Dannett: I object to the question. The statement speaks for itself. The only question here, your Honor, is how many duplicate memberships are there?

The Court: Get at the facts rather than an attempt to draw conclusions from the statements in the affidavit.

Q. How many members are members of two or more locals in the AFofM?

A. Two or more locals of the AFofM—there are 26,000 duplications—I am sorry, Mr. Schmidt, I have to answer the way I should.

The Court: All right, he didn't say anything.

A. (Continuing) —of which I have jotted my own notes down, if I may refer to it—12,381 members—I am going to use the word "members" there—

Q. My question, Mr. Scola, was: How many members of the AFofM belong to two or more AFofM locals?

A. I guess it is that figure, 12,381, then.

Q. So that the statement that you have in this affidavit, approximately 26,000 are members of two or more locals, is not correct?

A. No. I mean the statement I made there is correct, sir, [fol. 150] but it has to be explained how that figure is.

The Court: Literally, it isn't so?

The Witness: O. K., Judge.

The Court: It is conceded, there isn't any question about it.

Q. Mr. Scola, what is the source of the statistics which you have put in your affidavit of October 1, 1963—and I show you a copy of it and point out the statistics?

A. The source of that is from our IBM Department.

Q. Did you personally get that material from the IBM Department?

A. Yes, I did.

Q. Did you compile it in this statistical form yourself?

A. The information I got from the IBM Department I relayed it on to our counsel, who drew it in affidavit form.

The Court: What you are trying to say is you relied upon someone from the IBM Department of the Federation to give you these figures, is that correct?

The Witness: That's correct, your Honor.

The Court: You didn't compute it?

The Witness: I didn't compute it myself; the information was given to me.

Q. What is the name of the gentleman in the IBM Department to whom you applied?

A. Ernest Neri.

Q. Would you mind telling us what you asked him to supply you with?

A. Yes. I asked him to supply us with, as soon as possible, the number of members who belonged to two, three, four, five and six locals.

Q. What did he say to you?

A. He said he would work on it immediately.

The Court: He said what?

The Witness: That he would work on it immediately, to compile the information requested.

[fol. 151] Q. And eventually he gave you some statistical material from which you copied this material in your affidavit of October 1st?

A. That's correct, sir.

Q. In what form are the original records reflecting this statistical material kept?

A. As far as I know—

Q. If you don't know, say you don't know yourself of your own knowledge.

A. Only what was told to me.

Q. I wanted only your own knowledge.

A. That is a different building altogether.

The Court: You don't know how they computed this, what factors or what papers or cards this was computed from, do you?

The Witness: Only from what he told me, your Honor.

The Court: That would be hearsay. Anything else on this subject with this witness?

Mr. Schmidt: I wanted to go on to the rest of his affidavit. If your Honor is making a ruling I can't—

The Court: What did you want to examine him on?

Mr. Schmidt: For example, I find in paragraph eight of his affidavit, his earlier affidavit, he makes a statement that there were 1176 delegates eligible, although the credentials committee report says it is 2019 delegates, and I wanted—

The Court: I would like to have some explanation of that discrepancy because it is important perhaps in the counting of the votes. I will allow that.

Q. Mr. Scola, I show you your earlier affidavit of September 18th, and I refer you to paragraph eight thereof. Will you please read that to yourself.

(Witness examines document.)

A. Yes; all right.

[fol. 152] Q. Can you tell me what is the total number of delegates who were reported as eligible to vote at the 66th Convention?

A. 1176.

Q. Will you please point out in the official proceedings the source of that answer?

Mr. Dannett: It appears, your Honor, on page 30 of the official proceedings, at the bottom of that.

A. On page 30 of the official proceedings of the 1963 Convention.

The Court: That is at the bottom of the page, where it says "Number of delegates, 1176."

Q. Now, I refer you to page 57 of the official proceedings, and refer you to the top line in the first column, which specifies total number of delegates as 1219. Can you explain why the election committee report included that as the total number of delegates?

A. The only thing there, that election committee report of the 1219, the report of the committee, was not put in properly.

The Court: You say—

The Witness: They copied the wrong figure down.

The Court: You say the 1219 is incorrect?

The Witness: Yes, your Honor.

Q. You think it is incorrect?

A. Yes.

Q. Now, I refer you to pages 34 and 35 of the official proceedings, the report of the credentials committee. First, I want to ask, what is the credentials committee, and what is its function?

A. The credentials committee functions by checking all the credentials that have been received at the time immediately prior to the convening of the convention. They are the credentials received in the secretary's office from the various locals throughout the country.

[fol. 153] Q. Are these delegates elected in the locals by secret balloting?

A. Yes, they are.

Q. And the local sends some form of notification to the credentials committee, is that correct?

A. No.

Q. How does it work?

A. The credential blank forms are sent out to the locals based upon the number of members they have from our previous count with the per capita tax, as to their eligibility to send one, two or three delegates, as the case may be. Eventually, that local will send the credential properly filled out with the seal, and the signature of the officers, and whatnot, to the secretary's office.

We in turn acknowledge those credentials, and keep those credentials until such time as the convention convenes, where the night before the official convening of the convention the credentials committee sits to check on the credentials that have been received, and for that reason at that time there were 1219 credentials received. But 1219 delegates did not attend the convention.

Q. Unless the credentials committee approves the credential the delegate is not permitted to vote, is that correct?

A. If the credential was not accepted by the credentials committee he would not be eligible to be seated at the convention.

The Court: You say that 1219 were approved, but only, in effect, 1176 appeared?

The Witness: Some of them didn't show up.

The Court: Is this printed report, page—

Mr. Schmidt: 34 to 35?

The Court: No, page 7, where it commences with the various locals and gives the names and addresses of the delegates—is that a list of those actually in attendance?

The Witness: That's correct, your Honor.

The Court: From it was eliminated the names of all who were not in attendance, even though they may be approved as to the convention?

[fol. 154] The Witness: That's correct, sir.

The Court: Have you, or has anybody under your supervision, totalled the number of delegates listed here?

The Witness: Yes, your Honor.

The Court: That is 1176?

The Witness: 1176.

Q. Mr. Scola, isn't it the function of the credentials committee to file a report of its investigation of credentials?

A. Yes.

Q. And isn't it one of the functions of the credentials committee to certify the number of delegates who are entitled to be seated?

A. That is correct.

Q. Is the report on pages 34 and 35 the report of the credentials committee?

A. Yes.

Q. I call your attention to the last senfence of the first paragraph: "1219 delegates from 626 locals are represented here and are certified by your committee." Can you explain the meaning of that sentence?

Mr. Dannett: I submit, your Honor, that the question is objectionable.

The Court: Overruled. If he knows.

As he has testified just a few minutes ago, the credentials committee certified, that here the credentials committee purports to state that 1219 delegates from 626 locals are represented here. Is that statement correct?

The Witness: Well, that is a matter of verbiage that they used, your Honor.

The Court: It isn't a matter of verbiage, it is a matter of fact, isn't it?

The Witness: The fact is that 1219 credentials were received by the secretary's office, and 1219 delegates would have appeared at the convention, except somebody was sick or just a last-minute change. There would have been 1219 delegates.

[fol. 155] The Court: To your knowledge, is there any check by the credentials committee as to those who actually appeared?

The Witness: Yes, they check the credentials, your Honor.

The Court: You tell me actually there were 1176 there, whereas the credentials committee reports 1219. How could you account for that?

The Witness: The credentials committee reports 1219 credentials received, your Honor.

The Court: That isn't what it says. All right.

* * * * * * *

Mr. Schmidt: May I be heard on that particular point, because that was the second thing I wanted to advert to.

I maintain that the evidence here shows prima facie that at the very least there was a deliberate attempt on the part of officers who have fiduciary duty to make full disclosure to keep their proposal secret from the membership and from the locals until practically the time when they were asked to vote upon it. And they not only did this in the negative way of withholding their recommendation, although this man's testimony and his affidavit is that they were discussing it for two years, but they did it more positively by deliberately misinforming the delegates and the membership as to the significance of this Court's decisions and the decisions of the Court of Appeals.

The Court: How can I go into that if the vote was valid? I don't think it makes any difference.

Mr. Schmidt: Under Section 501(A) of the act, you can go into it.

The Court: What does that say?

Mr. Schmidt: That states that officers of the union are fiduciaries vis-a-vis the locals and the members, and for that very reason it is incumbent on them not to mislead the [fol. 156] membership. I say the membership was misled and, as a matter of fact, the record here—

The Court: If that is a valid objection there might be some issue of fact on that. I am not saying there is. I thought I could decide this on the basis of the vote, and that is all I would have to do, on the method of the vote. That has been my purpose.

* * * * * * *

The Court: With due respect to the Rule 56 and the admonition of the appellate courts that the district court should question the lawyers, I am not certain this kind of inquiry in testimony is such that would properly fit into a motion for summary judgment. I allowed the examination on the vote because that is a narrow, factual, tangible issue.

Mr. Schmidt: Then I have no further questions.

The Court: I will sustain the general objection.

Mr. Schmidt: All right.

The Court: Any questions from you, Mr. Dannett?

Mr. Dannett: Yes.

By Mr. Dannett:

Q. Mr. Scola, are there any members who are members of more than six locals?

A. None that I know of.

Mr. Dannett: That is all of this witness.

The Court: I will ask this question: Do you know of any provisions of the bylaws which either permit or prohibit the counting of these multiple memberships under a roll call?

The Witness: No, I know of no provision one way or the other, sir.

The Court: Do you know of any past precedents one way or the other?

The Witness: No, because this is the first experience I have had with rollcall votes since I have been going to conventions.

[fol. 157] The Court: As far as you know, there were no other rollcall votes since you have been going to conventions?

The Witness: Yes.

The Court: When did you start?

The Witness: 1944 was my first convention.

The Court: All right, that is all.

(Witness excused.)

The Court: Do you want to examine Mr. Neri?

Mr. Schmidt: I do want to examine Mr. Neri.

Ernest Neri, called as a witness, having been duly sworn, was examined and testified as follows:

By Mr. Schmidt:

Q. What is your office in AFofM?

A. Supervisor of the IBM department.

Q. How long have you been supervisor of this department?

A. Thirteen years.

Q. Are you a member of the AFofM?

A. No, I am not.

Q. You are a paid employee of the AFofM?

A. That's right.

Q. Prior to the thirteen years you speak of, were you employed by the AFofM?

A. No, I wasn't.

The Court: Were you employed by the IBM?

The Witness: That's right.

Mr. Schmidt: That is what I was going to ask next.

Q. Did you execute this affidavit on September 30th, which I am showing you?

A. That's right.

Q. Did you actually dictate this affidavit yourself?

A. To the lawyer, that's right.

Q. I beg your pardon?

A. I did give him the information, to the lawyer.

[fol. 158] Q. You gave the information to your lawyer?

A. Yes.

Q. And he dictated it?

A. Well—

Q. Is that right?

A. Yes.

Q. Then did you read it before you signed it?

A. That's right.

Q. Where did you get the statistics that appear at the end of your affidavit?

The Court: In paragraph nine.

Q. In paragraph nine, yes.

A. On IBM cards.

Q. In what form does the information from which you compiled these statistics appear in the IBM cards?

A. In what form?

Q. Yes.

A. There is the name and street address and city and state and social security number on the IBM card.

Q. Do you have one of those cards here?

A. Yes, I do.

Q. Would you get it, please?

(Document handed to counsel.)

Q. You handed me two IBM cards, one with the name George W. Saunders, and the other—no, both with the name George W. Saunders, but one with an address at 262 Prospect Avenue, and the other with a notation, Allied Asphalt Co. Would you explain what those notations mean?

A. Yes. In Local 204 he gave his address as this here.

Q. As Allied Asphalt Co.?

A. Right. In Local 746 he gives that information as his address.

Q. In other words, these two cards refer to a union member named George W. Saunders?

A. Right.

Q. And it contains the number of some locals?

A. That's right.

Q. And this one contains the number—

A. Of Local 204.

Q. —of Local 204, and this one of Local 746?

A. Right.

[fol. 159] Mr. Dannett: Would you read the rest of the information, or refer to it? They both have social security numbers, I believe.

Mr. Schmidt: I am coming to it.

Q. Now, next to the number of the local, and just to the right of it, appears another number. What is that?

A. That is the social security number.

Q. And that social security number would have to be the same for George W. Saunders on both cards?

A. Yes.

Q. What is the "29" next to that?

A. That is a state code.

Q. What does that mean?

A. In other words, for New Jersey the state code number is 29.

Q. What does the word "Dunellen" next to it mean?

A. That is a city.

Q. That is the city where George Saunders lives?

A. That's right.

Q. What about the perforation?

A. The perforation in the card indicates whatever is on the face of the card. These holes are passed through a machine, and it reads the card and interprets the information from the top of the card.

Q. In other words, the very message typewritten there appears now in the form of perforations so you can use the machine to isolate different cards?

A. Right.

Q. How many cards of this kind do you have in your IBM department at the AFofM?

Mr. Dannett: I object to the question. I don't know what "this kind" means.

The Court: Sustained as to form.

Q. How many membership cards do you have in your IBM department for the AFofM?

A. There's approximately 280,000 cards in the whole files, all the files.

Q. Do you have the exact number, or are you just making an estimate?

A. No, that is approximate.

[fol. 160] Q. Do you have the exact number?

A. No, because these files are constantly being marked on every day as changes and new members and cancellations come in.

Q. Did Mr. Scola, prior to your execution of this affidavit of September 30th, come to you and ask you for certain information?

A. That's right.

Q. What did he ask you?

A. He asked me to take out my dual membership files and give him a breakdown of how many members belong to two locals, three, four and five; and so on down.

Q. Did you do that?

A. That's right.

Q. What did you report to him?

A. I reported to him that for dual members of two locals there was 11,145; for three locals there was 1,074; for four locals there was 152; for five locals there was six; for six locals there was four, which gave me a total of 12,381.

The Court: How did you ascertain that?

The Witness: Through IBM machines, sir.

The Court: Does the card indicate the number of locals that the man is a member of?

The Witness: Yes, the card—I have two cards or three cards, if he belongs to more than one local. Then we run it through the tabulator with a summary punch which reads the social security number on the summary punch card. It comes up with how many locals this members belongs to.

Q. So that you processed all of the AFofM cards in your department for the purpose of getting the information Mr. Scola requested?

A. Just for the dual memberships. Just the members that belong to more than one local. We have a separate file for them.

Q. Oh, you keep the cards for dual membership in a separate file from the others?

A. That's right.

Q. So that you didn't have to put through the machine [fol. 161] all of the membership cards?

A. No, that's right.

Q. Just those that concerned dual membership?

A. Right.

Q. When did you make that report to Mr. Scola?

A. Monday.

Q. That is this past Monday?

A. No, this Monday.

Q. Monday of this week?

A. Yes. I gave him the full information, because I was working on a certain amount of trays each day, and I came up with this thing.

The Court: How do you know you have all the duplicate members in that file?

The Witness: Well, as far as we know we have as many as we found that the machine could read as a duplicate or a triplicate card.

The Court: You say that the cards of all the multiple members are filed separately, is that so?

The Witness: Yes.

The Court: How do you know that they get into that file as soon as they become multiple members?

The Witness: When a member comes in as a new member, we cut another card like this in a different color. When the machine reads that this card is going in, and it matches with

another card with the same social security number, it will select it out.

The Court: The machine does all that?

The Witness: That's right.

Q. Doesn't that mean you have to put all of the cards in at one time before you can select out those which are dual membership cards?

A. No, because when the girl gets these slips she checks them. If there is a change of address she checks it in one file, which is a master file alphabetically. And from this master file she can determine right away if it is a dual member. If it is a dual member she puts a little marking on the slip, and this slip is processed. Instead of one card to be [fol. 162] picked up, it picks up two, one for the master file and one that goes into the dual file.

Q. Can you state with certitude now that if you processed the vast number of cards for the entire membership of the AFofM through your IBM machine, and set the IBM machine to select out dual memberships, that it would result in no more than 12,381 dual memberships?

A. No, it might be able to get more out. Each time as the girl—sometimes there might be a difference in name, but the same social security number. It might appear later on. If we get a social security number in one or two or three days, then we have to pull the card out, put the social security number in, and then when it is filed it matches up with another local, and we pull them out and make him a dual.

Q. So if you did process all the AFofM cards, you might not come up with the same result you have given in your affidavit?

A. It might come up with more.

Q. Can you estimate how many more?

A. That I couldn't.

Q. Did Mr. Scola before Monday ask you for any information respecting dual memberships?

A. That's right, he asked me the beginning of last week if it was possible for me to determine the duals of two locals, three, four and five.

Q. Did you at any time give him any information to the effect that there were 26,000 members of the AFofM with membership in two or more locals?

A. I gave him a total of 26,174 when I finished the whole job. That was Monday.

Q. I mean prior to last Monday, did you ever give him any statistics showing a total of 26,000 members of the AFofM who belonged to two or more locals?

A. Well, no, I knew approximately, but I didn't know for sure until I finished the whole job.

Q. Did you estimate approximately that there were 26,000?

A. No, I didn't.

[fol. 163] Q. What information did you give him prior to Monday, when you gave him the accurate information that you talk of in your affidavit?

A. Each day as we were working on it I gave him a breakdown of how many cards I picked out as a dual, but I didn't give him a full total until I was finished. But we knew there was approximately 26,000.

Q. But prior to Monday, when you gave him the breakdown that you have just read into the record, did you give him any 26,000 estimate?

A. No.

The Court: Did you supply the number of members of each local to some officer before the convention?

The Witness: No, sir.

Mr. Schmidt: I have no further questions.

By Mr. Dannett:

Q. Mr. Neri, am I correct that sometime in the latter part of 1959 you were requested to ascertain the number of duplicate memberships?

A. That's right.

Q. Who made that request upon you?

A. Mr. Ballard.

Q. Do you know the reason for the need for ascertaining the number of duplicate memberships?

A. Yes. Some of the members were getting more than one magazine—that is, the International publication.

Q. And the purpose of your inquiry was to eliminate the duplicate mailing of the magazine to members?

A. Right.

Q. In order to obtain that information, what data did you need from members?

A. Their social security number.

Q. Was a letter written to locals asking them to furnish social security numbers of their members?

A. That's right.

Q. When was that done?

A. September 25, 1959.

Q. Did locals furnish the information requested?

A. That's right.

[fol. 164] Q. When the information came in, what was done with it?

A. We took the social security numbers from the list that they sent in to us, and we recorded it on the membership card.

Q. And these are the IBM cards to which you refer?

A. That's right.

Q. So that at that time—and we are now speaking of 1959 and 1960, is that correct?

A. Right.

Q. So that at that time you ascertained from the total AFofM membership the total of duplicate memberships?

A. Right.

Q. Do you recall how many duplicate memberships there were at that time?

A. No, we had no—we didn't have to have the figure on it.

Mr. Schmidt: I can't hear the witness, your Honor.

The Court: Speak up.

A. We didn't have a figure on it, because nobody ever questioned me on the figure of how many members were total, because that was only for my purpose of pulling them out of the geographical file, which was the mailing file.

Q. When you ascertained the number of duplicate memberships, am I correct that you then placed in a single file the cards to show the duplicate memberships?

A. That's right.

Q. And it is that file from which this present study was made, is that correct?

A. That's right.

Q. And that study is shown in your affidavit in paragraph nine?

A. That's right.

Q. As far as you know, is this substantially correct?

A. That's right.

Q. There may be some slight differences, is that correct?

A. That's right.

Mr. Schmidt: I object to the leading of his witness in that manner.

The Court: Overruled as to that.

[fol. 165] Q. In your opinion, to what extent, if any, might there be any variances between these figures and what might be the actual dual membership list?

A. I don't quite get you on that question.

Q. Do you think there is any material difference between the actual memberships and those stated in your affidavit in paragraph nine?

A. No.

Mr. Dannett: That is all.

Mr. Schmidt: I have one or two more questions, if your Honor pleases.

By Mr. Schmidt:

Q. Can you give us the total number of International Musicians' subscriptions?

A. There's about approximately 255,000. Approximately.

Q. Can you tell us, of that 225,000, how many are sent to non-members?

A. I couldn't tell you on that.

Q. Will your cards show how many are sent to non-members?

A. No, we have no record of that.

Q. You do know that many are sent to non-members, though, do you not?

A. That I have no knowledge.

Q. You don't know that, either?

A. No, I don't think there would be any non-members, because every one of them has a local number, so he must be a member of the Federation.

Q. Aren't there complimentary copies sent to union leaders of other unions?

A. No, that doesn't go through me. I have nothing to do with that.

Q. Then what is the difference, the discrepancy, between the 255,000, which is your estimate of the subscriptions to the magazine, and 280,000 which is the total membership?

A. Well, there is a possibility that magazines come back to us as undeliverable.

Q. Thirty thousand of them?

A. That is possible.

Mr. Dannett: That is 25,000.

Mr. Schmidt: 25,000.

[fol. 166] Mr. Dannett: And we stated the figure as 26,000, your Honor, in our papers, of the dual memberships.

Thank you, Mr. Schmidt.

The Court: I want to ask a question for the record of Mr. Dannett.

Article V of the Constitution and Bylaws of the American Federation of Musicians, which is attached as an exhibit to your moving papers, the next to the last sentence of Article V, on page 9, says: "All laws so passed shall be referred to a convention committee consisting of the executive board AFofM, and chairmen of all committees, who may sanction or vote on same, their action to be final."

Is it your answer that that applies to the action taken at this convention?

Mr. Dannett: Yes, your Honor, and it was so done.

The Court: Was that done, and if so does it appear in this record?

Mr. Dannett: Yes, your Honor.

The Court: Where is it in the record?

Mr. Dannett: The affidavit of Mr. Scola so states. I will refer to the specific page.

The Court: All right, as long as it is there. Is that all?

Mr. Dannett: Yes, it is. And may it please your Honor, Mr. Schmidt, who made an issue of fact of this in his complaint, in his 9(G) statement does not.

Will you step down, Mr. Neri?

(Witness excused.)

The Court: Is there anything else before I close this matter?

Mr. Schmidt: Yes.

The Court: I don't believe I have any brief from you, do I, Mr. Schmidt?

[fol. 167] Mr. Schmidt: May I ask Mr. Scola one further question, possibly two?

The Court: Yes. Mr. Scola, will you come up here?

GUY A. SCOLA resumed.

By Mr. Schmidt:

Q. Mr. Scola, were the credentials for each of the delegates to the 66th Convention kept by some officers, or some office in your union?

A. Yes, up until the Convention. You bring them with you to the Convention, a duplicate copy. The credential was sent in duplicate. The delegate retains one, we retain the other.

The Court: What did you do with the ones you retained?

The Witness: Brought them to the Convention, and turned them over to the credentials committee chairman for scanning.

Q. Did the credentials committee chairman give them to you or to your office to keep?

A. They were returned to us.

Q. Are they in your possession now?

A. Yes.

Q. So that they could be counted?

A. Yes.

Q. I see. One further question: Can you refer us to any section of the Constitution or Bylaws of the Federation that permits the splitting of votes of delegates?

Mr. Dannett: This is objected to, your Honor.

The Court: He may not be qualified. Is that the basis of the objection?

Mr. Dannett: Yes, your Honor. Well, no, my basis is this is not one of the subjects of inquiry.

The Court: I will allow it, if that is the only objection.

[fol. 168] Q. Are you familiar with the Constitution and Bylaws of the AFofM?

A. Somewhat, yes.

Q. On the basis of your familiarity with those documents, can you refer us to any section of the Constitution and Bylaws which authorizes the splitting of votes such as happened about twenty-times in the 66th Convention?

A. I know of no law one way or the other on that point.

Mr. Schmidt: Thank you, that is all.

Mr. Dannett: You may step down, Mr. Scola.

(Witness excused.)

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COLLOQUY BETWEEN COURT AND COUNSEL

The Court: It was apparently not a unit vote on some at least, because there was a split vote. Is there anything in the record to determine when there was a unit vote and when there was a split vote?

Mr. Dannett: Yes, we have stated in the affidavit that the chair announced, at the commencement of the vote, that the delegates of each local would have the option either to cast a single ballot which would be equal to the membership of the local or would have the option to split the vote.

The Court: Is that in this record here?

Mr. Dannett: Yes, sir.

Mr. Schmidt: Where?

Mr. Dannett: It is in my affidavit, your Honor, in the affidavit of Mr. Scola.

Mr. Schmidt: Where?

The Court: But it is not in the proceedings.

Mr. Dannett: It is not in the official proceedings, but it is in Mr. Scola's affidavit.

Mr. Schmidt: Where in Mr. Scola's affidavit?

The Court: In the first affidavit?

Mr. Dannett: Yes.

Mr. Mittelman: I believe it is paragraph 26.

[fol. 169] Mr. Dannett: "The chair announced"—page 13. It is the first full sentence on the top of that page.

The Court: This is page 13 of his affidavit?

Mr. Dannett: Yes. "The chairman announced that a roll-call vote would be taken, that delegates representing locals would have the option of voting as a unit based upon the membership of their locals or to split their votes."

The Court: So that we have that complicated situation in which in some cases the delegates took it into their own hands to say how the vote of the local should be taken—

Mr. Dannett: Just as at presidential nominating conventions the delegates from states are given the option to vote either as a unit or to split the vote, so similarly it was done here. There is nothing unusual about this. This is a representative vote. And quite properly the chairman, and I think democratically, offered the choice to these various delegates.

The Court: What it means from the so-called democratic standpoint is that the delegates decided how the vote of the members should be split, isn't that so?

Mr. Dannett: That is correct, sir.

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Mr. Dannett: The question, your Honor, that you have to consider is whether you will approve of a system which would destroy democracy within unions, because if you give one vote—

The Court: Let me say as to that that the substitute is not democracy. In other words, there is a provision in the statute—which is democracy, I suppose, or at least it is represented to be democracy—3(B)(2), which is direct democracy. That is a referendum to every member in good standing.

[fol. 170] Mr. Dannett: Holding a meeting of 260,000 members, your Honor, the cost of that kind of meeting would be absolutely prohibitive.

Mr. Schmidt: It is a referendum.

Mr. Dannett: And because of that Congress recognized—

The Court: It may be the cheaper and mistaken method which might have resulted in an illegal vote.

Mr. Dannett: It might, your Honor, if it was mistaken, which I submit it was not.

The Court: That is the thing, unfortunately, which I have to decide.

* * * * * * *

Mr. Schmidt: Your Honor, may I address myself to the remarks just made?

The Court: Yes.

Mr. Schmidt: Before I do that, I would like, in view of the importance Mr. Dannett attached to certain things that he said, to call Mr. Scola to find out whether or not they kept stenographic minutes of the proceedings at that Convention.

The Court: You may. If he knows.

Mr. Schmidt: Mr. Scola.

Guy A. Scola resumed.

The Court: This is, I assume, directed particularly to this alleged announcement of whether the vote might be a unit or split.

Mr. Schmidt: Right.

By Mr. Schmidt:

Q. Mr. Scola, you said before that you were present during the sessions of the Convention?

A. That's correct, sir.

[fol. 171.] Q. Were you on the dais?

A. Yes, sir.

Q. Do you know whether or not any stenographer was employed to take verbatim minutes of the remarks made at that convention?

A. None were employed to take verbatim minutes, but notes were made.

Q. Who made the notes?

A. The secretary, myself.

Q. Who else?

The Court: Are you a stenographer?

The Witness: I am equipped to take notes, sir, yes, sir.

Q. Shorthand notes?
A. Yes, sir.
Q. You can write shorthand?
A. Yes, sir.
Q. Did you take some of the proceedings in shorthand?
A. Yes, sir.
Q. Are all of your notes transcribed in the minutes of the official proceedings?
A. They are transcribed to the extent—
Q. Are they transcribed verbatim as you wrote them, as you took them down?
A. No, because I don't use them for that purpose.
Q. Were your minutes typed at any time?
A. The proceedings are the result of my—

The Court: No, he didn't ask you that.

Q. That isn't my question.

The Court: He asked you whether or not your record of the proceedings at the convention which you indicate that you took in shorthand, were those transcribed fully by you?
The Witness: Yes, sir.
The Court: Where are they?

Q. Do you have a copy of them here?
A. That is the result of a copy of my transcript.
[fol. 172] Q. I didn't ask you that. Do you have a copy of your verbatim transcription here?
A. No, I don't.
Q. Is it available for the Court?
A. The notes that I took?
Q. Yes.
A. They won't appear that way, sir. I have to make explanation.

The Court: How were they taken? Explain how they were taken, in shorthand?
The Witness: Some in shorthand, some in longhand.
The Court: Did you take any notes with reference to any announcement by the chairman with regard to the method of vote of the respective delegations?
The Witness: No. I had a tape recorder besides the notes I took.

The Court: Did you transcribe from this tape recorder?
The Witness: Some of it I have, yes.

Q. Who has the tape recording now?
A. The tapes are in my office.
Q. Are they audible, so you can listen to them?
Q. You can listen to them, yes.

Mr. Schmidt: Your Honor, I think that it is very important sooner or later in this proceeding for us to get a complete transcription—

The Court: You are getting me into a trial, that is all.

Mr. Schmidt: I don't want to get you into a trial at this stage, and I am not saying it has to take place before you make—

The Witness: Why don't you let me swear there was an explanation.

The Court: Will you please keep quiet, unless any question is asked you.

The Witness: I am sorry, sir.

[fol. 173] The Court: Are you a lawyer?

The Witness: No, sir. I am sorry.

The Court: Just answer questions. I don't mean to criticize.

The Witness: I'm sorry.

Q. Did you take verbatim—

Mr. Dannett: I object to any further questions along this line, your Honor. I don't see what issue of fact these questions are addressed to.

The Court: They are addressed to the method of taking this vote, whether there was a split vote or a unit vote, and whether the delegates were told that they had a choice.

Mr. Dannett: Mr. Schmidt still hasn't asked that question. Why doesn't he?

Mr. Schmidt: I am coming to it. I have not finished.

The Court: Of course, this witness has made an affidavit that there was. He may come to it, if he wants to, if he wants to ask him.

Q. You were present at the evening session, were you not?
A. Yes, sir.

Q. You were also on the dais?

A. Yes, sir.

Q. Did you transcribe verbatim the remarks of the chairman prior to the taking of the vote?

A. No, sir.

Q. That was recorded, however, on the tape?

A. Yes, sir.

Q. Did you make any kind of notation of what the chairman said in respect of the taking of the vote on recommendation No. 11?

A. I don't recall, sir.

The Court: What is that?

The Witness: I don't recall. I don't think so.

Mr. Schmidt: I have finished with the witness.

[fol. 174] By Mr. Dannett:

Q. Mr. Scola, what did the chairman say with respect to the roll-call vote?

A. The chairman—someone asked the question, as I recall, what does a roll-call vote mean? And the chairman gave the explanation that the delegates where they come from a local vote their local number yes or no, if there was more than one delegate and there was a division among those delegates as how they felt upon the motion or the action that was before them, they would call out their number and represent what portion or share of the membership they were voting yes or no.

The Court: Will you read that answer?

(Answer read.)

The Court: Is that all he said on that subject?

The Witness: That is all I recall offhand, sir.

Q. May I just ask, was anything said with respect to voting—total delegates voting as a unit or splitting the votes?

A. The explanation was made that those who wanted to split their votes had a right to do so.

The Court: Is that all? Is that all that was said about it.

The Witness: That is all I recall, sir, yes, sir.

By Mr. Schmidt:

Q. Was there any explanation made about the split vote in the case of Local 204, where one vote was cast for yes, and 540 cast for no?

Mr. Dannett: That is objected to. That is the vote as actually cast. How could there have been a question as to how they were going to vote?

The Court: Sustained.

Mr. Schmidt: I have no further questions of this witness.

[fol. 175] The Court: Was there anything said about options? Was that word used?

The Witness: Will you explain that?

The Court: Was there any word such as "option" used by the chairman?

The Witness: I don't recall. I don't remember.

The Court: All right.

Mr. Schmidt: I have no further questions of this witness.

October 16, 1963
10:15 a. m.

(Same Appearances)

COLLOQUY BETWEEN COURT AND COUNSEL

* * * * * * * *

Mr. Dannett: The second voice vote was referred to in my papers. It is not in the official proceedings. Here is an affidavit. This is annexed to an affidavit which I submitted. It is an affidavit of Mr. Carruthers, who is an employee of the Federation. He annexes to it a Toronto paper in which it says as follows: "The long discussion resulted in a night session called and at midnight the question was called. President Kenin could not make a decision on the oral vote of ayes and nays after two attempts. This resulted in a roll call."

* * * * * * * *

Mr. Dannett: * * *

So that there were two roll calls. What difference does it make? The president, the chairman, couldn't determine

whether the vote was carried on a voice count, and therefore he was required, under Roberts rules, to take the next step. Let me just read—

The Court: He was required to take a standing or hand vote under Roberts Rules—

Mr. Dannett: Yes, sir.

The Court: He was not, as I see it—I may be wrong—but as I see it he wasn't required to proceed under Article V. [fol. 176] Mr. Dannett: Your Honor, I differ there, if you don't mind.

The Court: I know you do.

Mr. Dannett: May I point out that Roberts Rules and the by-laws are subject to the provisions of the constitution. The constitution contains provisions for two types of weighted votes: The first in which each delegate gets one vote per 100 members, but not to exceed 10 votes per local, and the second is the weighted roll call vote that was involved here, which is based on the membership of the local.

Now, when it appeared—incidentally, I might say that the only purpose of the voice vote was to see whether it was carried, I would say, under the first of these two types of roll call votes—weighted votes—and that when the vote was close—obviously how many votes does a voice have where the voice comes from one local representing ten members—the chairman can't possibly determine that. That is why you do have in Roberts Rules, and that is why you do have in the constitution, these provisions which permit the calling of a roll call vote. What Roberts says the rule is: "When the vote is taken by a voice or show of hands any member has a right to require a division of the assembly by having the affirmative rise and then the negative, so that all may see how the members vote. Either before or after the decision any member may call for, or demand, a count . . ."

In this case the demand was made by virtue of the roll call vote asked for by five delegates.

The Court: It was asked for actually by an insider.

Mr. Dannett: That is correct, by one person speaking on behalf of five, and I submit, your Honor, this is drivel, that one person can't say "I speak in behalf of five people,"

and the five are there and the president says, "Do you have anything to say?" And they remain silent.

I say, your Honor, that it is five people speaking, one person speaking and the others acquiescing.

[fol. 177] I say further, your Honor, when the roll call vote was called for, Mr. Tomei, if he thought this procedure was improper, should have raised it by a point of order. He should have said, "This procedure is objectionable."

The Roberts Rules also have a provision there for a point of order being raised.

The Court: Failing to make an objection, does that validate the vote under the statute?

Mr. Dannett: In my opinion—may I get to the statute last, please? I want to deal with it. This is really an objection at this point that we didn't comply with the provisions of our own constitution.

I am saying, your Honor, that when the roll call vote was demanded and when the roll call vote was taken, when no point of order was raised by Mr. Tomei, when Mr. Tomei cast 1500 votes against it, Mr. Tomei, if he were here, the plaintiff, could not now challenge that vote any more so than could a stockholder at a corporate meeting, and I have in my brief cases which show the procedure with respect to stockholders is similar to what I am not asserting here. It is perfectly clear under Roberts Rules of Order that when no point of order is taken, the point was waived, although I submit, your Honor, there was nothing to waive here. The procedure was proper. But if there was a deficiency, as to which I can't find, I say it was waived, that Mr. Tomei having voted against the resolution, if he were here you would say to him, "You voted against it; you had your day to vote against it; you are not now entitled to a second day."

The Court: Frankly, all I am interested in now in getting is, (1) was there any other tape; (2) was there any other determination by the chairman on the vote of the delegates.

Mr. Dannett: There was none that was not given.

The Court: It is contended by the defendant, (1), there was no other tape of this portion at least of the proceedings, and that is all I am interested in.

[fol. 178] Mr. Dannett: That is correct.

The Court: And, (2), the claim is that there was no other determination by the chairman of an oral vote. I take it that is your position.

Mr. Dannett: That is correct. May I, your Honor—I don't think I am being repetitious, but I would like to just say that I feel that the provisions of the Federation's constitution have been observed, and that then brings me to the question which you put before: Have the provisions of Section 101(a) (3) (B) been complied with. That seems to be the one that I believe is giving you some concern.

The Court: I think that is the basic issue here.

. . . . . .

October 18, 1963
10:00 a. m.

. . . . . .

(Same Appearances.)

Mr. Schmidt: The witness who was subpoenaed did not put in an appearance. Perhaps there may be a little delay in the train.

The Court: I think there was an affidavit, Mr. Dannett, do you have that?

Mr. Dannett: Yes, sir, I have it here.

The Court: I have a case proceeding at ten-thirty. However, if your witness appears I will interrupt and take his testimony.

This affidavit is dated October 17 and apparently indicates that only one transcript was made as to that event and that transcript was made including the voting area at the meeting.

Mr. Schmidt: May I be heard for a moment because I read it and it doesn't answer the question your Honor raised at the last hearing. I don't think it is significant [fol. 179] whether or not there were two tapes or one tape or six tapes. I do think it is significant whether the full vote was taken on the tape and the excerpt which is attached to the last affidavit and certified by this Miss Wachtel definitely demonstrates that it does not contain any reference whatever to the voice vote which preceded. It jumps into the middle of things as it were.

Nor does it contain the full rollcall vote, that is to say, the rollcall vote actually taken while the secretary, Mr. Ballard was presiding.

It seems to me on its face it is incomplete and this affidavit simply says it is a transcript of a portion of the recording. This is obvious that it is a transcript of a portion but I don't think that is a portion that is full enough.

The Court: Is the tape here, Mr. Dannett?

Mr. Dannett: The tape is not in court, but we have the tape. We could produce it.

But I submit, your Honor, that I have produced what was called for as I indicated the other day, your Honor.

The Court: I indicated that I did not see any necessity of the tape but in view of what Mr. Schmidt just said, it may be there is an omission from the tape.

Mr. Dannett: As to what? I am not quite clear.

The Court: Apparently the transcript made by Wachtel—

Mr. Dannett: It begins with a request for a roll call.

The Court: But it doesn't contain any reference, does it, to the voice vote?

Mr. Dannett: That is correct. It begins just after the voice vote. I have heard the tape and you merely hear a shout of Ayes and a shout of Nos.

The Court: One vote by that means?

Mr. Dannett: No, there were two.

The Court: Two different voice votes?

Mr. Dannett: In other words, the chairman as I recall it indicated he couldn't tell how the first came out and had [fol. 180] it taken again and then indicated that he had a doubt as to the outcome and immediately after that there was a request for a roll call.

The Court: It will be conceded, will it not, there were two votes orally taken; that is, vocal votes taken and the chairman in each case said that he couldn't determine the result of such vote; is that correct, Mr. Dannett?

Mr. Dannett: That is correct.

The Court: Off the record.

(Discussion off the record.)

Mr. Schmidt: They don't have the answer of the delegates or any explanation which a delegate might have made.

Mr. Dannett: That is exactly the point. We are again going into a further fishing expedition. What difference does it make what answers or explanations were given. That is the reason I have resisted Mr. Schmidt's request for the tape. There is no question, it is indisputable it was adopted by a plurality of 44,000 votes. What difference does it make what anyone may have said? I, incidentally, don't know what was said but what difference does it make?

The Court: It makes no difference if the method itself was correct.

Mr. Schmidt: Right, I agree with that.

The Court: If I decided on that basis, then it makes no difference.

Mr. Schmidt: I agree with that but the very incorrectness of the method might be further demonstrated by a full transcript.

The Court: It is either a correct method or an incorrect method. If it is a correct method but an incorrect result, then there may be a dispute of fact here rather than of law. I don't know.

In other words, to say it another way, if the method itself by a rollcall of delegates as set forth in the official record of the Convention was an incorrect and illegal [fol. 181] method, then it makes no difference as to whether the figures or the statements made by the respective delegates of the different locals is correctly set up or not set up.

Mr. Schmidt: I concede that.

Mr. Dannett: That is correct.

Mr. Schmidt. I contend that the method was incorrect but I also felt that in view of what I thought your Honor at the last hearing, which I was unable to attend, this affidavit is not a complete affidavit of what you had in mind.

The Court: Well, frankly, I had in mind only the reference to the voice vote. I didn't realize there was a contest. I don't know that your associate made it clear to me there was some dispute about the actual count of rollcall voting allegedly made pursuant to Article V of the Constitution. Is that your impression?

Mr. Dannett: I never heard there was a question.

Mr. Schmidt: I am not raising a question about the count. I am assuming they did their arithmetic correctly.

The Court: I am asked to determine on the basis of what the record shows as to that rollcall. If you contest that and I have to conclude or I do conclude that the method is a proper method, then there is a question of fact.

Mr. Schmidt: I am not raising that question, your Honor. I am simply addressing myself to the proposition that the transcript as given does not do what it purports to do. It is only a very partial transcript.

The Court: I tried to analyze the issue insofar as whether it affected the transcript. Unless, as I say, you contend that the vote is improperly recorded, there isn't any issue here unless—

Mr. Schmidt: The only part of the vote that I would be interested would be to learn whether there were any subsidiary instructions for example by Mr. Ballard, even though the chairman, Mr. Kenin, did not make them.

Mr. Dannett: There were no other instructions.

The Court: The chairman indicated that the delegates should split the membership vote as they determine. That is clear in the transcript, as Miss Wachtel translated it.

[fol. 182] Mr. Schmidt: For the purposes of this motion I am not interested, in view of the concession just made by Mr. Dannett, that there were no other instructions, about the splitting, I am not interested in the latter part of the voting.

The Court: All right. Then it is fully submitted.

Mr. Schmidt: But the voice vote, I am interested in; I think it was an illegal procedure.

The Court: Either this motion is fully submitted or it isn't. Now, let us be clear on that. Is it fully submitted on your part, Mr. Dannett?

Mr. Dannett: Yes, sir.

Mr. Schmidt: It is not fully submitted in my opinion, on my part, unless we get a transcript of the portion that concerns the voice vote which directly led to the rollcall vote.

Mr. Dannett: May it please your Honor—

The Court: I don't know how that is going to add anything, Mr. Schmidt, except to indicate that there was a

second voice vote which was inconclusive. What else is there?

Mr. Schmidt: It wouldn't add anything to the contentions I have made. I have made the contention the voice vote was itself improperly conducted and therefore the Constitution was violated because they did not follow the bylaws of the union in following up the voice vote with a rising vote, or if that wasn't conclusive, with a count of those who—

The Court: That is all before me.

Mr. Schmidt: If that is all before you I say it is fully submitted because I don't even have Mr. Tomei's testimony for this motion.

The Court: I will put it this way, Mr. Dannett: Will you concede there was no further attempt to count the delegates' vote other than that which appears in the record by roll calling? In other words, there was no count by hands or by the ballots of the delegates other than this system which appears in the record, namely, by the local allocations?

Mr. Dannett: I concede that.

[fol. 183] The Court: Now, Mr. Schmidt, are you satisfied? Is it submitted?

Mr. Schmidt: Then I am.

* * * * * * *

Mr. Dannett: May I press two points, however? This does not add to anything in the record. Number one, all of our papers in support of the motion in the Wittstein case, I would like to have considered in support of the motion in Schwartz and the opposition papers, of course.

The Court: Yes.

Mr. Schmidt: I join in that.

The Court: Whatever disposition is made of the Convention vote problem in the Wittstein case, of course, will apply to that cause of action in the Schwartz case.

Mr. Dannett: Thank you, sir.

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[fol. 184]

In United States Court of Appeals

For the Second Circuit

Nos. 246 and 247—September Term, 1963.

Argued November 20, 1963.

Docket Nos. 28563 and 28564

Eddie Wittstein, Ben Cutler, Julius Schwartz, Marty Levitt, Claude Garreau, Bert Fisher, George Auld, Leo Greco, Hector DeRienzo, Milton Farowitz and Matt Gillespie, Plaintiffs-Appellees,

—against—

American Federation of Musicians of the United States and Canada, Defendant-Appellant.

Julius Schwartz, Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, Plaintiffs-Appellees,

—against—

Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada, Defendant-Appellant.

[fol. 185]

Before: Medina, Waterman and Marshall, Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*.

American Federation of Musicians of the United States and Canada and Associated Musicians of Greater New York, Local 802, appeal, respectively, from two summary judgments granted in consolidated actions holding invalid

the action of the June 1963 Convention of the Federation increasing dues. Opinion below reported at —— F. Supp. ——. Affirmed.

Godfrey P. Schmidt, New York, N. Y., for plaintiffs-appellees.

Emanuel Dannett, New York, N. Y. (Henry Kaiser and George Kaufmann, Washington, D. C., Jerome H. Adler, Herbert D. Schwartzman, Eugene Mittelman, and McGoldrick, Dannett, Horowitz & Golub, New York, N. Y., for defendant-appellant, American Federation of Musicians of the United States and Canada, and David I. Ashe and Ashe & Rifkin, New York, N. Y., for defendant-appellant, Associated Musicians of Greater New York, Local 802, on the brief), for defendant-appellant, American Federation of Musicians of the United States and Canada, and defendant-appellant, Associated Musicians of Greater New York, Local 802.

[fol. 186]

OPINION—December 18, 1963

MEDINA, Circuit Judge:

As a result of our decision in *Cutler* v. *American Federation of Musicians*, 2 Cir., 1963, 316 F. 2d 546, cert. denied, December 9, 1963, —— U. S. ——, holding invalid the 10 per cent travelling surcharge imposed by certain provisions of the By-laws and Constitution of the Federation, an attempt was made to supply funds deemed necessary to take the place of the travelling surcharge by presenting for adoption at the ensuing Annual Convention of the Federation held in June, 1963, a resolution increasing per capita membership dues. When this resolution was passed these consolidated actions were brought by individual members of the unions to challenge the validity of the dues increase on the ground that it violated the provisions of the Labor-Management, Reporting and Disclosure Act of 1959, Section 101(a)(3)(B), 29 U. S. C., Section 411(a)(3)(B). Judge Levet sustained this contention and held the action of the Convention in passing the increase of dues

resolution void, on the ground that the Act required that each delegate cast only one vote, whereas the roll call method pursued at the Convention allowed the votes of the delegates to be weighted in such manner as to count as votes by the number of members in the locals represented by the delegates, and not by counting the vote of each delegate as a single vote. His opinion, *Wittstein* v. *American Federation of Musicians*, S. D. N. Y., 1963, is reported at —— F. Supp. ——. Numerous other miscellaneous points are raised, especially in the brief of appellees, but, as we agree with Judge Levet on the principal question of law involved, we do not find it necessary to discuss the other points.

The two cases were disposed of by summary judgments for plaintiffs. In *Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* the judgment is final. In *Schwartz, et al.* v. *Associated Musicians of* [fol. 187] *Greater New York, Local 802, American Federation of Musicians of the United States and Canada*, only the first count of the complaint was dismissed, as other questions than those discussed in this opinion were raised, but Judge Levet made the customary finding and order prescribed by Rule 54(b) of the Federal Rules of Procedure. Thus appeals by the Federation and by Local 802 are properly before us.

The controlling language of the 1959 Act, Section 101 (a)(3)(B), 29 U. S. C., Section 411(a)(3)(B), applicable specifically to "Dues, Initiation Fees, and Assessments" provides that rates of dues and initiation fees payable by union members shall not be increased except

> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar govern-

ing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

These provisions apply to the Federation, which is a labor organization other than a local labor organization or a federation of national or international labor organizations [fol. 188] within the meaning of the Act, and the Federation is conceded to be a labor organization in an industry affecting commerce as defined in Section 3(i) of the Act, 29 U. S. C., Section 402(i).

Article 5 of the Federation's Constitution contains the basic rules governing "Representation and Delegates," as follows:

"All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

And the By-laws, in Article 28, relating to Convention Proceedings and the order of business at such conventions, prescribe

"Section 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided, and the manner of voting shall be viva voce, unless [fol. 189] otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution."

The procedure followed at the June, 1963 Convention followed this pattern to the letter. We find nothing to support appellees' protestations to the contrary. Two voice votes of the delegates were inconclusive, there was a demand by five locals or more for a roll call. At the roll call the votes of the delegates were weighted in such fashion as to record in favor of or against the resolution not the number of delegates but the number of members of the local represented by the delegates. Thus Local 802, represented by two delegates,[1] cast 28,438 votes against the resolution.[2]

As we read the Constitution and the By-laws, the decisive vote was required to be by roll call, on proper demand, and such a demand must be complied with, irrespective of the result of any prior voice or standing vote. Thus, even if the voice vote had been clearly one way or the other, and even if a standing vote thereafter taken had been equally plain for all to see, the roll call, on proper demand, would decide the issue. Otherwise, the provisions of the Constitution and By-laws make no sense. Indeed, we have no reason to doubt that a proper demand for a roll call would have to be acceded to, even if made prior to the taking of any voice or standing vote.

Moreover, as appellants claim to be the case, the weighted voting is to all appearances the most "democratic" method, in the sense that each member is duly "represented," and it is a method of voting widely recognized as fair and [fol. 190] proper by a number of unions. Not only are simi-

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[1] Local 802 was entitled under the Federation's Constitution to three delegates.

[2] As not affecting the result, in the view we take of the applicable law, we do not discuss the split or duplicate votes cast at the 1963 Convention.

lar provisions to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system.

We think what we have just said clears the air. We may now leave aside confusing irrelevancies and digressions and address ourselves to the simple, central issue: in the context of Section 101(a)(3)(B), 29 U. S. C., Section 411 (a)(3)(B), do the words "by majority vote of the delegates voting at a regular convention" mean one vote for each delegate?

As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less, that the resolution as passed was void, as violative of the plain requirements of the Act: and, that the judgments appealed from must be affirmed.

The Act thus construed does not "virtually disenfranchise thousands of appellants' members" as the statute provides an alternative method of increasing dues by referendum, in which case the issue would be determined "by majority vote of the members," rather than "by majority vote of the delegates." Voting by stockholders of corporations is not, we think, an analogous situation. The same is true of methods prescribed by the federal or state constitutions or by legislation for the nomination or election of various public officials. Nor is it of significance that Title IV of the Act apparently permits the election of officers of unions by a weighted vote. The considerations the Congress may well have thought relevant to election of officers on the one hand, and raising dues at regular conventions, on the other, are not the same.

[fol. 191] True it is that the Bill of Rights, so-called, in Section 101(a)(1), 29 U. S. C., Section 411(a)(1), is "subject to reasonable rules and regulations in such organization's constitution and by-laws." And Section 103, 29 U. S. C., Section 413, provides that nothing in Title I, "Bill of Rights of Members of Labor Organizations," shall limit the rights or remedies of members of unions under any

State or Federal law, "or under the constitution and bylaws of any labor organization." But these provisions are of no avail to appellants, for two reasons. In the first place, Section 101(b), the very Section prescribing a "majority vote of the delegates voting at a regular convention" for an increase of dues, states: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with this section shall be of no force and effect." In the second place, no requirement of a weighted vote could possibly be considered "reasonable," in the face of a statutory requirement of one vote for each delegate.

It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically allowed weighted voting. S. 1137, 86th Cong. 1st Sess., Section 104(2) (1959); H. R. 4473, 86th Cong. 1st Sess., Section 102(b)(3) (1959). These bills were rejected.

Everyone seems to agree that the Labor-Management Reporting and Disclosure Act was "to insure union democracy," and that the intended beneficiary of the provisions of the Act is the union member. O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959). But the natural inference to be drawn from a reading of the Act, especially the portion relating to increases of dues, initiation fees, and assessments, is that the specific enumeration of methods of proposing and voting for such increases is intended to be exclusive. One need not be steeped in the historical data affecting the uses and abuses of labor organizations to realize that any compli- [fol. 192] cated system of proposing and voting for increases in dues, initiation fees and assessments is subject to manipulation, to the disadvantage of the individual union member. We hold that the simple, unambiguous requirements set forth in Section 101(a)(3)(B) were intended to mean just what they appear on their face to mean, and that in this way the Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved.

Other contentions by the respective parties have not been overlooked.

Affirmed.

Judge Marshall dissents and will file an opinion in a few days.

[fol. 193] MARSHALL, Circuit Judge (dissenting) (filed December 23, 1963):

I must respectfully dissent from the opinion of my brothers. Like them, I recognize that a weighted voting system appeared in many representative union constitutions prior to the enactment of the Labor-Management Reporting and Disclosure Act of 1959,[1] and that the statutory provision in question "was not brought about by any abuses found to have flourished under the aegis of that system."[2] My disagreement is only with the conclusion that the words "by majority vote of the delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions, insofar as it is used to approve dues increases.[3]

I think it is fair to say that the majority decision rests principally on the so-called "plain meaning rule," i.e., that the statutory phrase is capable of but one interpretation. My brethren recognize, as noted above, that elimination of the weighted voting system was not consciously put forward as a goal of the Act, whose main thrust was to correct the flagrant abuses of power by some union officials which had been uncovered by extensive Congressional investigations. Nor does any reason readily suggest itself [fol. 194] for barring the weighted ballot system in connection with dues increases voted at union conventions but

[1] 73 Stat. 522, 29 U. S. C. §401 et seq.

[2] See Leiserson, American Trade Union Democracy 122 (1959). "Through a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes, the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership."

[3] Throughout this opinion, the word "weighted" is restricted to the method whereby delegates vote proportionate to the membership of the locals they represent. Nothing herein is to be construed as a blanket approval of all methods of weighted voting.

in no other respect. It is clear that, with regard to election of officers and, indeed, any other action taken at these conventions, the system is perfectly acceptable. Cf. §401(f) of the Act, 29 U. S. C. §481(f). I can find no support for the majority's suggestion that dues increases are a particularly "fertile field" for "skulduggery," to which an especially strict standard should be applied.

We are left then, with the "plain meaning" rule as the only real basis for the majority decision. Conceding that the crucial phrase, taken in isolation, most naturally bears the majority's interpretation of it, I do not believe that any other reading is absolutely barred. The term used is "majority vote of the delegates voting," not "vote of a majority of the delegates voting." It bears the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending on the size of the locals which they represent. Where there are compelling reasons to give such interpretation, and none to give the more apparent one, it is open to us to do so. The plain meaning rule, after all, "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48 (1928) (Holmes, *J.*). Again, it has been said that "words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.'" *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943). Of course, the "rule" has an important place as a canon of construction and I do not wish to contest the general proposition that the language actually chosen is the most reliable guide to the legisla- [fol. 195] ture's intention. But it is a myopic view, and one oblivious of precedent, that shuts us off from consideration of the purposes intended to be served by legislation in a case where the "plain meaning" rule leads to incongruous and even unjust results. See, e.g., *United States* v. *American Trucking Assn.*, 310 U. S. 534 (1940); *United States* v. *Dickerson*, 310 U. S. 554 (1940); *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50 (1942); *N. L. R. B.* v.

Lion Oil Co., 352 U. S. 282 (1957); *J. C. Penney Co.* v. *Commissioner*, 312 U. S. 65 (2 Cir. 1962).

Of the many provisions of the LMRDA, section 101(a)(3) was one of the least controversial. It first appeared in an amendment offered by Senator McClellan on the Senate floor to add a "Bill of Rights" to the labor reform bill which had been reported by the Senate Committee on Labor and Public Welfare (S. 1555, 86th Cong., 1st Sess.). See 105 Daily Cong. Record 5810 (April 22, 1959), reprinted in 2 N. L. R. B. Legislative History of the Labor-Management Reporting Disclosure Act of 1959, 1102 (1959).[4] Senator McClellan's amendment provided that in the case of a national labor organization the rates of dues should not be changed, and no new dues, initiation fees or assessments imposed except by a majority vote of the delegates present at a duly constituted convention. Senator McClellan explaining this part of his amendment, said only that

> In other words, the dues or the initiation fees cannot be increased, as they have been in certain instances. For example, if certain jobs come along, the initiation fees are hiked up. Some of the new members get the new jobs, and the old members who have been members for a long time, get no assignment to work. That has [fol. 196] happened in my State, and it is happening in other States, too. It is not right; it is wrong. 2 *Leg. Hist.* 1104.

There was no further floor discussion of this part of the amendment prior to the vote on it. On April 24, 1959, Senator Kuchel offered an amended "Bill of Rights" title which reworded most of the provisions to eliminate ambiguities and overly broad language in some of them. The paragraph dealing with dues increases was amended to provide three methods of increasing dues: (1) majority vote of the members at a meeting or (2) a referendum through the mails or (3) in the case of a national or international organization, "by majority vote" at a regular or duly constituted special convention. Senator Kuchel of-

[4] Hereinafter cited as *Leg. Hist.*

fered no explanation of the changes in this provision, indicating that it was taken "almost verbatim from that part of the McClellan amendment which was applicable • • •" 2 *Leg. Hist.* 1232. Again, there was no further floor debate until the revised "Bill of Rights" was passed.

The bill then moved to the House. As is well known, three versions of the Labor Reform Bill, H. R. 8342 (the Elliott Bill, reported by the Committee on Education and Labor), H. R. 8400 (the Landrum-Griffin Bill, which was ultimately adopted on the floor) and H. R. 8490 (the Shelley Bill, generally favored by organized labor) were the most important ones considered. The relevant language of all three bills was identical, and was the language finally enacted into law. The principal changes from the Senate version were that only dues increases, rather than all changes in dues, were required to be submitted to membership action, that a referendum vote was specifically authorized for both local and national labor organizations, and that executive boards of national unions were authorized to make interim increases until the next regu- [fol. 197] lar convention of the organization. These changes were apparently made in response to criticisms of the Senate Bill voiced by representatives of organized labor at hearings before the House Committee on Education and Labor.

The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the "right to participate in deciding upon the rates of dues" (H. Rep. No. 751, 86th Cong., 1st Sess. 7); or "to control membership and other fees charged by the union" (*id.* at 78); or to "protect against exorbitant rates or arbitrary changes in dues and fees." 2 *Leg. Hist.* 1520 (remarks of Rep. Griffin).

It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under

the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions. In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members.

In summary, then, I am most reluctant to employ the "plain meaning" rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse [fol. 198] whatsoever. It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term "majority vote of the delegates voting" is susceptible to a construction which would allow delegates' votes to be weighted in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein.

[fol. 199]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. Sterry R. Waterman, Hon. Thurgood Marshall, Circuit Judges.

JULIUS SCHWARTZ, et al., Plaintiffs-Appellees,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant-Appellant.

JUDGMENT—December 18, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 200] [File endorsement omitted]

[fol. 201]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. Sterry R. Waterman, Hon. Thurgood Marshall, Circuit Judges.

EDDIE WITTSTEIN, et al., Plaintiffs-Appellees,

v.

AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA, Defendant-Appellant.

JUDGMENT—December 18, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 202] [File endorsement omitted]

[fol. 220] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 221]

SUPREME COURT OF THE UNITED STATES

No. 775—October Term, 1963

AMERICAN FEDERATION OF MUSICIANS, etc., et al., Petitioners,

vs.

EDDIE WITTSTEIN, et al.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Goldberg took no part in the consideration or decision of this petition.